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No. _____

In The

Supreme Court of the United States

LADEL BAPTISTE HARRISON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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STATEMENT OF THE QUESTIONS PRESENTED FOR REVIEW

1. Whether 18 U.S.C. § 922(g)(1), properly construed in light of the constitutional limits on Congress's commerce power, requires proof that the defendant's receipt or possession of a firearm has a direct and substantial nexus with interstate commerce, such that mere evidence that the firearm once crossed state lines some unknown amount of years prior to its possession by the defendant is insufficient to convict?

2. Whether a defendant is entitled, under the Sixth Amendment, to a jury trial on the fact and nature of his prior convictions, where a prior felony conviction is an element of the offense, and where a minimum sentence of fifteen years is mandatory under 18 U.S.C. § 924(e) in cases of defendants having three or more "violent felon[ies]" or "serious drug offense[s]"?

PARTIES TO THE PROCEEDING

The parties to the proceeding are:

LADEL BAPTISTE HARRISON, an individual;

UNITED STATES OF AMERICA.

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari be issued to review the judgment below.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, number 05-30314 is unpublished. It is reprinted verbatim in the Appendix at App. 16.

The United States District Court for the Eastern District of Washington entered a final amended judgment of conviction and sentence on August 10, 2005. App. 6-15. Excerpts of the trial transcript reflecting the District Court's relevant rulings are reprinted at Appendix at App. 21-92.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Ninth Circuit affirmed the District Court Judgment on May 8, 2006. App. 16. No petition for rehearing was filed.

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, § 8, cl. 3 of the United States Constitution ("the Commerce Clause") provides:

> The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

The Sixth Amendment to the United States Constitution provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . .

Section 922(g)(1) of Title 18 of the United States Code provides, in pertinent part:

> (g) It shall be unlawful for any person – (1) who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year . . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

Section 924(e) of Title 18 of the United States Code provides, in pertinent part:

> (1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

STATEMENT OF THE CASE

A. Statement of Facts.

1. Petitioner Ladel Baptiste Harrison, a person on parole for a state felony conviction, obtained a firearm in trade for a portable stereo and twenty dollars, while at a friend's apartment in Spokane, Washington. App. 34, 41.

2. The gun was shown to have originated in Ohio some years before, but when it came to Washington and how many owners it had in Washington before Harrison obtained it are unknown. App. 41-42.

3. Washington state police officers found the firearm stored on top of a kitchen cabinet in the same apartment in which Harrison bartered for the gun. App. 34-35. The gun never left the apartment nor was it used or carried by Harrison during the time he possessed it. App. 34.

4. On December 4, 2004, Harrison was arrested in Spokane, Washington, for having violated his state parole. App. 1.

5. After his arrest, Harrison was sentenced at a parole violation hearing to 55 days incarceration by the State of Washington for having violated his parole by, *inter alia*, possessing a firearm. App. 32-33.

B. Procedure Below.

1. On January 24, 2003, Harrison was charged in the United States District Court for the Eastern District of Washington for being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). App. 1. The charging language in the Indictment states:

> On or about December 6, 2002, in Spokane, in the Eastern District of Washington, LADEL BAPTISTE HARRISON, being a person who had theretofore been convicted of an offense punishable by imprisonment for a term exceeding one year, did possess a firearm to wit: a High Point, Model C, 9 mm. handgun, serial number P033197, which firearm had theretofore been transported in and affecting interstate commerce; all in violation of 18 U.S.C. § 922(g)(1).

2. Prior to trial, the Government filed notice that it was charging Harrison as an armed career criminal pursuant to 18 U.S.C. § 924(e), which mandates a sentence of fifteen years to life for a defendant who qualifies as an armed career criminal. App. 3-5. This charge was not included in the indictment. App. 1.

3. Harrison went to trial on February 28, 2005. The Government presented evidence that Harrison obtained the gun from a friend in Spokane, Washington. Further evidence was presented that Harrison acquired the gun in trade for $20 and an old stereo, and then stored it in the same apartment in which the trade took place. App. 34-35. Further, the Government presented no evidence of use of the firearm by anyone or that it was ever removed from the apartment at any time after the trade. The Government did offer evidence indicating that the firearm had been manufactured in Ohio and had passed through other states approximately five years prior to its possession by Harrison in Washington. App. 38. However, the Government offered no evidence as to when the gun came to Washington, or how many people in Washington possessed the gun before Harrison. App. 37-38. Also, no evidence was presented that the firearm affected commerce in any

material way other than to have been transported over state lines perhaps years prior to its possession by Harrison.

4. At trial, Harrison stipulated to having been previously convicted of a crime punishable by one year of imprisonment. App. 30-31. The Government did not submit any evidence to the jury which would support a finding that Harrison had three prior felonies, nor that any prior conviction was for "violent felon[ies]" or "serious drug offense[s]," which are prerequisites to a finding that Harrison qualified as an Armed Career Criminal pursuant to 18 U.S.C. § 924(e).

5. The trial court prohibited Harrison's counsel from saying, in argument to the jury, that Harrison was facing a mandatory minimum sentence of fifteen years' incarceration if convicted pursuant to 18 U.S.C. § 924. App. 22-23, 26-27.

6. Harrison requested an instruction that the Government was required to prove that the firearm had been in commerce at the time of his possession, or that it had substantially affected commerce at that time. App. 54-55. This was denied. Harrison also moved for acquittal given the prosecution's failure to prove the requisite interstate nexus. App. 58-60. This was denied. The district court relied on *Scarborough v. United States*, 431 U.S. 563 (1977), in denying both motions. App. 54-55, 64. The trial court effectively directed a verdict on the jurisdictional commerce element by instructing the jury that:

> The second element that the government must prove beyond a reasonable doubt is that the firearm the defendant is charged with possessing had traveled in or affected interstate commerce. . . . It is sufficient for the government to

> satisfy this element by proving that at any time prior to the date charged in the indictment, the firearm crossed a state line. It is not necessary that the government prove that the defendant himself carried it across a state line, nor must the government prove who carried it across or how it was transported. . . .

App. 68.

7. Harrison was convicted on March 1, 2005, of a violation of 18 U.S.C. § 922(g). App. 6-15. The maximum sentence for such a conviction is ten years in prison, 18 U.S.C. § 924(a)(2), unless the defendant qualifies as an armed career criminal, in which case a minimum mandatory sentence of fifteen years is imposed and a life sentence is authorized. 18 U.S.C. § 924(e).

8. On June 17, 2005, relying upon evidence not presented to the jury, the trial court found that Harrison qualified as an armed career criminal, and imposed a 235 month (19 years, 7 months) sentence. App. 71-92. The trial court believed that Harrison was not entitled to a jury trial on these disputed factual issues under *United States v. Booker*, 543 U.S. 220 (2005), relying instead upon *Almendarez-Torres v. United States*, 523 U.S. 224, 244 (1998). App. 72-91.

9. Harrison appealed his conviction to the United States Court of Appeals for the Ninth Circuit. On appeal, as in the lower court, Harrison acknowledged that the Ninth Circuit was bound to apply *Scarborough* and *Almendarez-Torres, supra*, but preserved his constitutional objections for review by this Court. App. 17-20.

10. The Court of Appeals for the Ninth Circuit affirmed Harrison's conviction. *United States v. Harrison*, No. 05-30314 (9th Cir. 2006). App. 16-20.

SUMMARY OF ARGUMENT

1. Petitioner was convicted of felony firearm possession without proof of a direct or substantial nexus between his receipt of the firearm and interstate commerce, which is required by both the language of the statute and by the limits of the commerce clause. 18 U.S.C. § 922(g) contains a jurisdictional element, which requires the United States to allege and prove "possess[ion of a firearm] in and affecting commerce" or "recei[pt of a firearm] which has been shipped or transported in interstate or foreign commerce." In *Scarborough*, the Court held that Congress intended a previous version of the felon-in-possession statute to prohibit possession of *any* firearm that had once moved in interstate commerce, and thus the statute required only "the minimal nexus that the firearm have been, at some time, in interstate commerce." *Id.* at 575. This Court's later decisions in *United States v. Lopez*, 514 U.S. 549 (1995), *United States v. Morrison*, 529 U.S. 598 (2000), and *Jones v. United States*, 529 U.S. 848 (2000), have raised doubts about the viability of the Court's holding in *Scarborough*, and suggest it should not be applied to 18 U.S.C. § 922(g).

Relying on *Scarborough*, lower federal courts (including those in Harrison's case)[1] allow defendants such as

[1] In its unpublished decision affirming Harrison's conviction, the Ninth Circuit cited *United States v. Gonzales*, 307 F.3d 906 (9th Cir.

(Continued on following page)

Harrison to be convicted of felony gun possession where the only proof of an interstate nexus is that the firearm was manufactured in a state other than the one in which it was found in the defendant's possession, regardless of how much time has passed since the weapon traveled in interstate commerce, regardless whether it has come to rest in a particular state, and regardless whether any impact upon interstate commerce occurred or is proved. Some courts have upheld these convictions reluctantly, noting the conflict between *Lopez* and *Scarborough*, but explaining that until this Court affirmatively overrules *Scarborough*, they are bound to uphold the convictions. *See cases cited in section A(4) herein.*

It is noteworthy that Congress itself did not purport to exercise power of such broad scope in section 922(g). On the contrary, Congress carefully limited the statute to the proper exercise of its constitutional power over goods "in or affecting commerce." The constitutional problem has arisen as a consequence of the lower courts' liberal application of the *Scarborough* rule, and the refusal to recognize that section 922(g) requires a relationship between the defendant, his receipt of the firearm and its travel in interstate commerce.

The Court should hold, consistent with *Lopez*, that a defendant may not be convicted of a violation of section 922(g) without proof that the firearm, at the time in which the defendant possessed it, had a direct or substantial nexus to interstate commerce.

2002). App. 18. *Gonzales* was at the end of a line of cases leading back to *United States v. Hanna*, 55 F.3d 1456 (9th Cir. 1995). *Hanna* derived its authority from *Scarborough*.

2. In *Booker*, this Court held the Sixth Amendment requires that a jury, rather than a judge, decide all disputed facts that determine a sentence in a mandatory sentencing regime. Harrison was convicted and sentenced under a mandatory sentencing scheme; however, his mandatory sentence turned on facts (related to his prior convictions) that were determined by a judge, not a jury. App. 58-65.

In *Almendarez-Torres*, the Court held that a defendant's prior convictions need not be submitted to a jury because they are mere sentencing enhancements rather than elements of the offense. However, prior convictions (at least one) are an element of section 922(g), and *Almendarez-Torres* has been questioned by a member of this Court and by lower courts. *Apprendi v. New Jersey*, 530 U.S. 466, 489-90 (2000); *Shepard v. United States*, 544 U.S. 13, 27-29 (2005) (Thomas, J., concurring). Yet, the lower courts continue to apply *Almendarez-Torres*, as is their duty,[2] while simultaneously questioning its validity.

Harrison was sentenced as an armed career criminal under a mandatory sentencing scheme to nearly twenty years in prison as a felon in possession of a firearm. App. 6-15. The facts supporting the trial court's conclusion that Harrison was an armed career criminal, although disputed, were never submitted to a jury. Consequently, this case presents the conflict between *Apprendi* and *Almendarez-Torres*, which should be resolved in such a way as to

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[2] In its unpublished decision in Harrison's case, the Ninth Circuit cited *United States v. Smith*, 390 F.3d 6[illegible]th Cir. 2004), which is traceable to *United States v. Quintana-Qui[illegible]a*, 383 F.3d 1052 (9th Cir. 2004), in which the Ninth Circuit relied upon *Almendarez-Torres*. App. 17-20.

uphold the Sixth Amendment right to a jury trial. Harrison's conviction should be reversed.

REASONS FOR GRANTING THE PETITION

A. The Court Should Grant Review to Resolve a Conflict Among This Court's Own Precedents Relating to the Commerce Power of Congress, The Court's Decisions in *Scarborough* and *Barrett*, Which Were Applied to Harrison to Allow a Felony Firearm Possession Conviction Based Upon Mere Proof that the Firearm Once Crossed State Lines at Some Earlier Time, Are Irreconcilable with *Lopez*, *Morrison*, and *Jones*, and Should Be Expressly Overruled.

1. 18 U.S.C. § 922(g)(1) prohibits convicted felons from possessing a firearm that is "in or affecting commerce" or receiving a firearm "which has been shipped or transported in interstate or foreign commerce." The lower federal courts have interpreted this Court's decision in *Scarborough* to permit a conviction under section 922(g), upon mere proof that the firearm traveled in interstate commerce at some time in its history.

Although *Scarborough* has not been expressly overruled, this Court's more recent decisions in *Lopez*, *Morrison*, and *Jones*, have raised doubts in the lower federal courts about whether *Scarborough* can be constitutionally applied to section 922(g). These decisions have recognized that Congress's Commerce Clause authority is limited, and that to constitutionally legislate using its commerce power, the regulated activity must have substantial effect on interstate commerce.

If *Scarborough* is applied to section 922(g) to interpret that statute as permitting evidence of a single instance of interstate travel at any time in the life of an item to satisfy proof of interstate nexus, then Congress effectively has the power under the Commerce Clause to regulate *any item* (and possession of the item) for eternity simply because it once crossed state lines. Congress, of course, does not have such limitless power under the Commerce Clause, as recognized by *Lopez*, *Morrison* and *Jones*. *Scarborough*, as applied to section 922(g) by the lower federal courts, is irreconcilable with *Lopez*.

Congress did not overstep the constitutional limits on its power. Ironically, the mischief lies with *Scarborough*, not the statute itself. Section 922(g) in fact contains explicit language limiting its application to circumstances directly implicating interstate commerce, but that language has been glossed over by lower courts that consider themselves bound by *Scarborough*.

This Court should grant the writ to resolve the confusion arising from the conflict between *Lopez* and *Scarborough*, and should hold that section 922(g) must be interpreted to require proof that the defendant's possession of a firearm have a substantial relation to interstate commerce.

2. 18 U.S.C. § 922(g)(1) prohibits convicted felons from possessing a firearm "in or affecting interstate commerce" and from receiving a firearm that has been "shipped or transported in interstate or foreign commerce." The Government presented evidence at trial that Harrison, while at a friend's apartment in Spokane, Washington, obtained a firearm in trade for a portable stereo and twenty dollars. App. 34-35. The gun was shown

to have originated in Ohio some years before, but there was no evidence when it came to Washington or how many owners it had in Washington before Harrison obtained it. App. 37-38. Weeks later, the authorities found the firearm stored on top of a kitchen cabinet in the same apartment in which Harrison bartered for the gun. App. 34-35. Consequently, there was no evidence that Harrison himself transported the weapon over a state line, or that he received it while it was in interstate commerce, or that he used it in any way, or that he even removed it from the apartment in which he received it.

To prove the interstate commerce element of section 922(g), the Government introduced expert testimony that the weapon had been manufactured in Ohio, and subsequently transported to Montana; its whereabouts thereafter were unknown until the gun appeared approximately five years later in Harrison's possession in Washington. App. 38. Thus, the only evidentiary link to interstate commerce is that the weapon had crossed state lines perhaps years prior to Harrison's possession of the gun.

Harrison requested that the trial court instruct the jury that the Government was required to prove that the firearm "have been shown to have been in commerce at the time or to have substantially affected commerce at the time of the offense." App. 54-55. This was refused. App. 54-55, 64-65. Harrison also sought a directed verdict of acquittal on the grounds that the United States had failed to satisfy its proof as to an interstate nexus, but the trial court denied the motion. App. 58-60.

Section 922(g)(1) of Title 18 of the United States Code provides, in pertinent part:

> (g) It shall be unlawful for any person – (1) who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year . . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

There was no allegation that Harrison shipped the firearm in interstate commerce, or carried it in interstate commerce, or proof that Harrison possessed it in a manner that affected interstate commerce. The "in or affecting commerce" language requires proof that "at the time of the offense the gun was moving interstate or on an interstate facility, or [that] the possession affects commerce." *United States v. Bass*, 404 U.S. 336, 350 (1971). The question, therefore, is whether mere proof that the firearm had crossed state lines years before it reached the defendant is sufficient to satisfy the interstate nexus requirement of section 922(g).

The Government relied upon *Scarborough* and the final provision in section 922(g) forbidding receipt of a firearm that has been transported in interstate commerce. App. 61-62. This provision, however, also necessarily requires some relationship between the receipt of the firearm and its travel in interstate commerce. If no temporal relation were intended between shipment and receipt, then Congress could have included the words "at any time" at the end of the statute. Congress also would not have used the limiting verb "receive" after "ship or transport," but would have prohibited "possession" of a firearm that had ever traveled in interstate commerce, as it did in the previous provision of section 922(g). Congress did not draft the statute so broadly.

Indeed, if the "receipt" provision of section 922(g) were read to allow a single transportation of a firearm across state lines to trigger section 922(g) as to all subsequent possessors of the firearm, no matter how long after interstate shipment and no matter how many intermediate, intrastate actors received it, then the statute's other clause, which prohibits possession of a firearm "in or affecting commerce," would be surplusage. Felons who "[p]ossess [a gun] in or affecting commerce" would be nothing more than a narrow subclass of the broader class of felons who "receive" guns that had once upon a time traveled in interstate commerce (one cannot, after all, possess a thing without receiving it in all but the most extraordinary circumstances). The broader reading of the statute adopted by the lower courts (following *Scarborough*) contravenes settled rules of construction. "Judges should hesitate . . . to treat statutory terms in any setting [as surplusage], and resistance should be heightened when the words describe an element of a criminal offense." *Ratzlaf v. United States*, 510 U.S. 135, 140-141 (1994).

Consequently, the plain language of section 922(g) does not permit conviction where the only proof of interstate nexus is the firearm's transportation across state lines some unknown years before the defendant received it.

3. In *Scarborough*, the defendant was charged with felony firearm possession in violation of 18 U.S.C. § 1202(a), the predecessor of section 922(g)(1). 431 U.S. at 565. The *Scarborough* Court held that Congress intended the felon-in-possession statute to prohibit possession of any firearm that had moved in interstate commerce, and thus the statute required only "the minimal nexus that the firearm have been, at some time, in interstate commerce." *Id.* at 575.

In *Barrett v. United States*, 423 U.S. 212 (1976), the Court ruled that the former 18 U.S.C. § 922(h), which like the current version of section 922(g) forbade a convicted felon "to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce", was unambiguous, and allowed conviction upon proof that the firearm once traveled in interstate commerce.

Neither *Scarborough* nor *Barrett*, however, considered section 922(g); rather, both opinions involved statutes that are no longer effective. Moreover, neither Court decided whether Congress had the constitutional authority to regulate an item (or conduct related to it) for eternity simply because it had once crossed state lines, regardless of whether it was "in commerce" or employed to "affect" commerce.

Subsequent to *Scarborough* and *Barrett*, this Court decided three cases that did address the scope of Congress's ability to legislate pursuant to the Commerce Clause. These cases, although they did not expressly overrule *Scarborough* and *Barrett*, suggest that those decisions cannot constitutionally be applied to section 922(g). *See Lopez, Morrison, Jones.*

In *Lopez*, the Court held that the Gun-Free School Zones Act of 1990, 18 U.S.C. § 922(q)(1)(A), which prohibited "any individual knowingly to possess a firearm at a place that the individual knows . . . is a school zone," was beyond Congress's Commerce Clause authority and invalid. *Lopez*, 514 U.S. at 551. The Court held that Congress may regulate only "those activities having a substantial relation to interstate commerce, *i.e.*, those activities that substantially affect interstate commerce." *Id.* at 558-59.

The Court noted that the firearm possession statute was not limited to any "discrete set of firearm possessions . . . [with] an explicit connection with or effect on interstate commerce." *Id.* at 562. It "contain[ed] no jurisdictional element which would ensure, through case-by-case inquiry, that the [conduct] in question affect[ed] interstate commerce." *Id.* at 561. Nor was the gun possession statute defensible as "an essential part of a larger regulation of economic activity." *Id.* at 561.

The Court, therefore, concluded that the gun possession statute was merely "a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise." *Id.* at 561. Because the statute neither regulated a commercial activity nor contained a requirement that the gun possession be connected in any way to interstate commerce, the Court declared the statute invalid as beyond Congress's Commerce Clause authority. *Id.*

In *Morrison*, the Court held that part of the Violence Against Women Act, 42 U.S.C. § 13981, which created federal civil liability for the commission of a gender-motivated crime, was also beyond Congress's commerce power. The Court noted that gender-motivated crime was not economic in nature. 529 U.S. at 610-11. Moreover, the statute in question contained no express jurisdictional element which would limit its reach to a discrete set of gender motivated violence cases that had a demonstrable connection with or effect on interstate commerce. *Id.* at 613.

Unlike the statute in *Lopez*, however, the Violence Against Women Act was supported by congressional findings that gender-motivated violence affected interstate

commerce "by deterring potential victims from traveling interstate, from engaging in employment in interstate business, and from transacting with business, and in places involved in interstate commerce; . . . by diminishing national productivity, increasing medical and other costs, and decreasing the supply of and the demand for interstate products." *Id.* at 615 (quoting H.R. CONF. REP. NO. 103-711, at 385 (1994)). These congressional findings, however did not save the statute. The *Morrison* Court rejected Congress's attempt "to follow the but-for causal chain from the initial occurrence of violent crime . . . to every attenuated effect upon interstate commerce." *Id.* Absent some showing that such violence substantially affected interstate commerce in a more direct manner, the Court concluded Congress could not regulate it pursuant to the Commerce Clause.

In *Jones*, the Court considered the federal arson statute, which forbids damage "by means of fire or an explosive . . . [to] property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce." 18 U.S.C. § 844(i). Jones argued that a private residence was not within the statute because the residence was not "used in" any activity affecting interstate commerce. *Jones*, 529 U.S. at 850. The government contended the private residence was "used in" three activities "affecting commerce" because the homeowner mortgaged and insured the property through out-of-state entities, and the home received natural gas from interstate sources. *Id.* at 854-55.

The Court noted that "[p]ractically every building in our cities, towns, and rural areas is constructed with supplies that have moved in interstate commerce, served by utilities that have an interstate connection, financed or

insured by enterprises that do business across state lines, or bear some other trace of interstate commerce." *Id.* at 857. The Court held the jurisdictional element covered only property actively employed for commercial purposes; a "passive, passing, or past connection" to interstate commerce was not sufficient. *Id.* at 855. By construing the arson statute narrowly, the *Jones* Court avoided the constitutional question that would arise from reading the statute to reach any residence with such an attenuated connection with interstate commerce. *Id.* at 858.

Lopez, *Morrison*, and *Jones* recognized the limitations on Congress's ability to pass legislation that provided the federal government the police power generally held by the states. Section 922(g) contains language plainly limiting its application to items actually in or affecting commerce. *Scarborough* should not be applied to broaden section 922(g) beyond constitutional limits.

There is a critical difference between the former section 922(q)(1)(A), which was held to be invalid in *Lopez*, and section 922(g), which is at issue here: section 922(g) contains a jurisdictional element, requiring proof that the firearm have been possessed "in or affecting interstate commerce" or that the defendant have "receive[d] any firearm . . . which has been shipped or transported in interstate or foreign commerce." According to *Lopez*, such a jurisdictional element is necessary to "ensure, through a case-by-case inquiry, that the [conduct] in question affect[ed] interstate commerce." 514 U.S. at 561. But, because of *Scarborough*, the lower courts have felt bound not to require such proof.

4. The lower courts have been vocal in expressing their doubts that *Scarborough* is good law:

> [O]ne might well wonder how it could rationally be concluded that mere possession of a firearm in any meaningful way concerns interstate commerce simply because the firearm had, perhaps decades previously before the charged possessor was even born, fortuitously traveled in interstate commerce. It is also difficult to understand how a statute construed never to require any but such a *per se* nexus could "ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce." *United States v. Lopez*, 514 U.S. 549, 115 S. Ct. 1624, 1631, 131 L. Ed.2d 626 (1995). However, the opinion in *Scarborough v. United States*, 431 U.S. 563, 97 S. Ct. 1963, 52 L. Ed.2d 582 (1977), dealing with the predecessor to section 922(g), requires us to affirm denial of relief here.

United States v. Rawls, 85 F.3d 240, 243 (5th Cir. 1996) (Garwood, J., specially concurring).

The Fifth Circuit is one of many courts to acknowledge the conflict between *Scarborough* and *Lopez*, and to recognize that this conflict cannot be resolved without the intervention of this Court. *United States v. Cortes*, 299 F.3d 1030, 1037 n. 2 (9th Cir. 2002) (noting that doubts have been raised, but choosing, "[u]ntil the Supreme Court tells us otherwise," to "follow *Scarborough* unwaveringly"); *United States v. Kirk*, 105 F.3d 997, 1004-05 (5th Cir. 1997) (evenly divided court *en banc*) (Higginbotham, J.) (upholding section 922(o), the ban on possession of machine guns, but relying on the third *Lopez* category instead of the more expansive approach in *Bass*, a predecessor case to *Scarborough*, and noting that "[i]t is not for us to say that *Bass* cannot survive *Lopez*"); *id.* at 1016 n. 25 (Jones, J.) (finding the statute unconstitutional under the three *Lopez*

categories yet noting that "[w]e are not at liberty to question" *Scarborough*, despite its "tension" with *Lopez*); *United States v. Kuban*, 94 F.3d 971, 973 n. 4 (5th Cir. 1996) (noting the "powerful argument" against the constitutionality of section 922(g)(1) but regarding *Scarborough* "as barring the way" for an "inferior federal court"); *id.* at 976-78 (DeMoss, J., dissenting in part) (distinguishing the statute in *Scarborough* and finding its holding "in fundamental and irreconcilable conflict with the rationale" of *Lopez*); *United States v. Lemons*, 302 F.3d 769, 773 (7th Cir. 2002) (noting "ample Seventh Circuit precedent" upholding section 922(g)(1) because of its jurisdictional hook and suggesting that if *Lopez* undercuts this approach, "it is for the Supreme Court to so hold"); *United States v. Chesney*, 86 F.3d 564, 571 (6th Cir. 1996) (following *Scarborough*); *id.* at 577-82 (Batchelder, J., concurring) (distinguishing *Scarborough* because it did not reach the constitutional question, concluding that despite its jurisdictional hook section 922(g)(1) fits none of the *Lopez* categories, but nevertheless concurring because of prior Sixth Circuit precedent).

Defense counsel, meanwhile, who in many cases serve (like Harrison's counsel) at the expense of the United States taxpayers, are bound to expend their time and resources – as well as those of the United States Department of Justice and the courts – to insure that they preserve what they conceive to be constitutional error prejudicial to their clients. If they are wrong – and Petitioner respectfully submits they are not – the Court should settle the question nevertheless by reconciling *Scarborough* and *Lopez*.

5. Petitioner respectfully submits that *Scarborough* and *Barrett*, as interpreted by the lower federal courts and

applied in Harrison's case to excuse the government's burden of proving a substantial nexus with interstate commerce, are incompatible with the terms of section 922(g) and with constitutional limits on the commerce power as discussed in *Lopez*. This conflict has caused both confusion in the lower courts and injustice to defendants like Harrison; certiorari should be granted and *Scarborough* overruled.

B. The Court Should Grant Review to Resolve a Second Conflict Between Its Precedents *Booker* and *Almendarez-Torres*: Harrison's Right to a Jury Under the Sixth Amendment Was Violated When, Based Upon Findings Made by the Court Without a Jury, His Sentence Was Increased from a Maximum of Ten Years to a Minimum of Fifteen Years.

1. In *Booker*, this Court held that the Sixth Amendment requires that a jury, rather than a judge, decide all disputed facts that determine a sentence in a mandatory sentencing regime. As a general rule, if the law makes an increase in a defendant's authorized punishment contingent upon a finding of a fact, that fact must be found by a jury beyond a reasonable doubt. *See Apprendi*, 530 U.S. 466; *see also Blakely v. Washington*, 542 U.S. 296 (2004). In other words, a defendant may not be "expose[d] . . . to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone." *Apprendi*, 530 U.S. at 483, 499; *see also id.* at 499 (Scalia, J., concurring) ("[A]ll the facts which must exist in order to subject the defendant to a legally prescribed punishment *must* be found by the jury.").

In the instant case, the Government gave notice prior to trial that it was charging Harrison as an "armed career criminal" pursuant to the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e), which mandates a sentence of not less than fifteen years, and up to life in prison. App. 3. Conviction under this statute requires proof that the defendant have three prior convictions, each of which qualifies as "a violent felony" or "a serious drug offense."

At trial, the prosecution did not submit any evidence to the jury which would support a finding that Harrison had three qualifying prior offenses. Rather, Harrison stipulated to having one prior felony. App. 30-31. No evidence was presented to the jury regarding any other prior conviction. Consequently, the jury never made any factual findings that Harrison had more than one prior conviction or that any of his convictions constituted "violent felon[ies]" or "serious drug offense[s]," as those terms are defined in the ACCA. At sentencing, Harrison disputed the Government's contention that his prior convictions included a "violent" felony. Nevertheless, over the objection of Harrison, the trial court, without explanation, found that Harrison qualified as an armed career criminal and imposed a 235 month (19 years, 7 months) sentence without the possibility of parole.[3] App. 72-91. This

[3] Prior to trial, the district court also ruled, over the objection of Harrison, that counsel for Harrison could not inform the jury that Harrison was facing a mandatory sentence of fifteen years to life if convicted for being a felon in possession of a firearm. App. 22-23, 26-27. This ruling denied Harrison his right to a jury trial (which requires jury consideration of the case in light of expected punishment) and his right to due process (by depriving Harrison of a hearing before a decision-maker empowered to decide whether his sentence was just, and burdening Harrison with a presumption that all persons know the law

(Continued on following page)

sentence exceeds the maximum penalty of ten years imprisonment for a conviction as a felon in possession under 18 U.S.C. § 922(g). *See* 18 U.S.C. § 924(a)(2).

2. Although *Apprendi* and *Booker* hold the Sixth Amendment to require a jury, rather than a judge, to decide all disputed facts that determine a sentence in a mandatory sentencing regime, the Court in *Almendarez-Torres* had created an exception where the disputed fact is a prior conviction. Almendarez faced a maximum two-year sentence for being an alien who returned to the United States after having once been deported in violation of 8 U.S.C. § 1326. 523 U.S. at 226-27. His maximum sentence was subject to an 18-year increase if he had been deported following an "aggravated felony" conviction. *Id.* The trial judge, rather than the jury, determined that the underlying conviction constituted an aggravated felony. Thereafter, the defendant appealed, claiming his Sixth Amendment rights were violated by the preclusion of a jury determination as to whether his underlying convictions constituted an aggravated felony.

This Court expressed the issue as "whether the [aggravated felony] provision defines a separate crime or simply authorizes an enhanced penalty." *Id.* at 226. In holding that previous convictions need not be submitted to a jury, the Court decided that a prior conviction is merely an "enhancement," and not an element that must have been pled in the indictment and submitted to a jury. *Id.* at 239-47.

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while forbidding him to remind the jury of the provisions of a law they are already deemed to know).

This "prior conviction exception" is inapplicable to Harrison's situation because Harrison was convicted and sentenced pursuant to two distinct statutes which define offenses, both of which require proof of prior convictions as an element of the offense, not merely an enhancement.

3. Harrison was convicted by a jury of felony gun possession under 18 U.S.C. § 922(g), which expressly requires proof that the defendant have "been convicted in any court of a crime punishable by imprisonment for a term exceeding one year" as an element of the offense. In addition to section 922(g), Harrison was also found (by the court, not the jury) to be an "Armed Career Criminal" pursuant to 18 U.S.C. § 924(e), which mandates a sentence of no less than fifteen years in prison, and authorizes a sentence of life in prison.

These are two distinct offenses. Section 922(g) requires proof that the defendant was a felon who received a firearm with an interstate nexus. Section 924(e) incorporates the elements of section 922(g), but also requires proof of an additional element – that the defendant have been convicted of three prior offenses that qualify as "violent felon[ies]" or "serious drug offense[s]." This is no less an element of the offense than is the requirement under both sections 922(g) and 924(e) that the government prove that the defendant have been convicted of a crime punishable by imprisonment for a term exceeding one year, which indisputably must be resolved by a jury under a reasonable doubt standard of proof.

The *Almendarez-Torres* "prior conviction exception" has no application where, as in this case, the fact of prior conviction is an express element of the offense, which is the case for both sections 922(g) and 924(e). Moreover, the

latter statute requires proof of an additional element that goes beyond the mere fact of prior conviction; it requires resolution of whether the defendant's prior convictions qualify as "violent felon[ies]" or "serious drug offense[s]." This is plainly a separate element that must be proven, as opposed to a mere sentencing enhancement. Consequently, the disputed nature of Harrison's prior convictions should have been submitted to the jury. The resolution of this issue by the judge violated Harrison's Sixth Amendment right to a jury trial.

4. Even if section 924(e) were not a distinct offense, recent decisions by the Court suggest that the "prior conviction exception" is no longer valid. The continued soundness of *Almendarez-Torres* was doubted in *Apprendi* ("*Almendarez-Torres* . . . represents at best an exceptional departure from . . . historical practice"). As stated in *Apprendi*, when the state tried to argue that a particular fact was a mere "sentencing factor" and not an "element" of a crime: "[i]t does not matter how the required finding is labeled, but whether it exposes the defendant to a greater punishment than that authorized by the jury's verdict, as does the sentencing 'enhancement' here." 530 U.S. at 467. By holding that the distinction between an enhancement and an element was immaterial, the *Apprendi* decision undercut the basis upon which the *Almendarez-Torres* relied in creating the "prior conviction exception."

The *Apprendi* Court, however, declined to apply its rationale to the issue of prior convictions because the petitioner in *Apprendi* did not challenge the validity of the Court's previous decision in *Almendarez-Torres* and, therefore, the Court did not need to resolve the issue. *Id.*

at 489-90. The Court in *Apprendi* did address the apparent conflict of its holding with that of *Almendarez-Torres*.

> Even though it is arguable that *Almendarez-Torres* was incorrectly decided, and that a logical application of our reasoning today should apply if the recidivist issue were contested, Apprendi does not contest the decision's validity and we need not revisit it for purposes of our decision today. . . .

Id.

See also id. at 449-523 (Thomas, J., concurring). Justice Thomas has more recently expressed his misgivings about *Almendarez-Torres*; first in *Shepard* (Thomas, J., concurring), and more recently in *Banegas-Hernandez v. United States*, ___ U.S. ___, case no. 05-10815 (June 12, 2006) (Thomas, J., dissenting).

The lower federal courts have expressed doubts about *Almendarez-Torres*, but have continued to apply it, as they are bound to do. *See United States v. Chapa-Garza*, 243 F.3d 921, 928 (5th Cir. 2001) ("But no matter how much in doubt the continuing viability of *Almendarez-Torres* may be, that decision is not overruled unless and until the United States Supreme Court says it is."); *United States v. Pacheco-Zepeda*, 234 F.3d 411, 414 (9th Cir. 2001) ("*Almendarez-Torres* may eventually be overruled. But such speculation does not permit us to ignore controlling Supreme Court authority."); *United States v. Murillo-Iniguez*, 318 F.3d 709, 713 (6th Cir. 2003) ("We have said, '[a]lthough the Court's decision in *Apprendi* arguably casts doubt on the correctness of the holding in *Almendarez-Torres*, ... *Almendarez-Torres* remains the law.'") (citations omitted); *United States v. Bock*, 312 F.3d 829, 831 (7th Cir. 2002) ("In short, the

issue Bock raises, while effectively a settled one, is one on which reasonable minds might disagree. It is not out of the question that the issue might be reexamined by the Supreme Court."); *United States v. Rodriguez-Arreola*, 313 F.3d 1064, 1068 n. 3 (8th Cir. 2002) ("Concerned that the Supreme Court has noted but not resolved the issue, the district court applied the clear-and-convincing standard of proof in finding that Rodriguez committed an aggravated felony for sentencing purposes because the issue significantly affected the severity of his sentence.").

This Court should clarify the Sixth Amendment's requirement that a jury, not a judge, make all factual findings that contribute to a defendant's sentence in a mandatory sentencing scheme, including whether a defendant's prior convictions qualify as predicate offenses under the ACCA. *See Shepard*, 544 U.S. at 27 (Thomas, J., concurring) (describing the question of whether an offense qualifies as a violent felony or serious drug offense under the ACCA as a "contested *factual* matter") (emphasis added). *Almendarez-Torres* should be overruled.

5. If the Court does not overrule *Almendarez-Torres*, then the Sixth Amendment, as illustrated in *Booker*, requires the trial court to treat 18 U.S.C. § 924(e) as advisory rather than mandatory. Section 924(e) must also be treated as advisory, not mandatory, if *Almendarez-Torres* is overruled but the prior convictions referred to in section 924(e) are deemed matters of enhancement rather than elements of the offense. The *Booker* court reasoned that the Sixth Amendment entitled defendants to the right to have a jury find all facts that would lead to an enhanced sentence, regardless of whether that fact was labeled an element or a sentencing enhancement. 543 U.S. at 237-38. However, the Sixth Amendment is not violated where the

judge makes factual determinations as to matters not constituting elements of an offense in a non-mandatory sentencing regime. *Id.* at 259-60.

In the instant case, Harrison was sentenced under a mandatory sentencing scheme, and the judge, rather than a jury, resolved disputed issues of fact without which Harrison could not have been found to be an Armed Career Criminal and subjected to a mandatory minimum sentence.[4] He was deprived of his right to a jury trial under the Sixth Amendment.

CONCLUSION

Based on the foregoing, petitioner, Ladel Baptiste Harrison, respectfully requests his petition for a writ of certiorari to be granted.

Respectfully submitted,

WITHERSPOON, KELLEY, DAVENPORT & TOOLE, P.S.
LESLIE R. WEATHERHEAD
Appointed Counsel for Ladel Baptiste Harrison under the Criminal Justice Act

Dated: August 7, 2006

[4] In imposing sentence, the trial court noted that it was concerned with the severity of the mandatory sentence, indicating that it appeared inequitable that a defendant who was offered a plea of approximately nine years in prison was to receive a nearly twenty-year sentence simply because he had exercised his right to a jury trial. App. 74. Nonetheless, the trial court was obligated to impose the mandatory minimum sentence.

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA, Plaintiff, vs. LABEL BAPTISTE HARRISON, Defendant.	INDICTMENT Vio: 18 U.S.C. § 922(g)(1) Felon in Possession of Firearm

(Filed Jan. 24, 2003)

The Grand Jury Charges:

COUNT 1

On or about December 6, 2002, in Spokane, in the Eastern District of Washington, LADEL BAPTISTE HARRISON, being a person who had theretofore been convicted of an offense punishable by imprisonment for a term exceeding one year, did possess a firearm to wit: a High Point, Model C, 9 mm. handgun, serial number P033197, which firearm had theretofore been transported in and affecting interstate commerce; all in violation of 18 U.S.C. § 922(g)(1).

DATED this 24th day of January, 2003.

A TRUE BILL

/s/ [Illegible]
Foreman

/s/ James A. McDevitt
James A. McDevitt
United States Attorney

/s/ Pamela J. Byerly
Pamela J. Byerly
Assistant United States Attorney

James A. McDevitt
United States Attorney
Eastern District of Washington
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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA, Plaintiff, vs. LABEL BAPTISTE HARRISON, Defendant.	)	CR-03-016-RHW Information to Establish Prior Convictions

(Filed Apr. 7, 2003)

The United States Attorney charges:

That the above named Defendant is an Armed Career Criminal pursuant to 18 U.S.C. § 924(e) and places the Defendant on notice that the government will be pursuing the Armed Career Criminal sentencing enhancement per the cited statute. The Defendant will be facing the following potential penalty: Imprisonment of not less than fifteen years nor more than life, ineligible for probation, nonsuspendable, nonparolable; and/or a fine of not more than $250,000.00; supervised release of not more than five years.

The government alleges that the Defendant is an Armed Career Criminal based on the following known convictions:

	Charge	Sentence Date
1.	Delivery of Cocaine King County, WA (Cause No. 96-1-03433-5)	September 13, 1996
2.	Delivery of Cocaine King County, WA (Cause No. 89-1-05692-1)	December 1, 1989
3.	Second Degree Assault Snohomish County, WA (Cause No. 95-1-01990-5)	May 24, 1996
4.	Attempt to Allude King County, WA (Cause No. 93-01250-7)	April 2, 1993

Attached for the convenience of court and counsel as Government's Exhibit 1, 2, 3 and 4 are the judgment and sentences entered in the above convictions.

DATED this 4th day of April, 2003.

James A. McDevitt
United States Attorney

/s/ Pamela J. Byerly
Pamela J. Byerly
Assistant United States Attorney

I declare under penalty of perjury, pursuant to 28 U.S.C. § 1746, on April 7, 2003, I placed a copy of the foregoing in a prepaid envelope placed in the outgoing mail of the United States Attorney's Office for the Eastern District of Washington, which is deposited in the United

States mail at Spokane, Washington, to the persons indicated below, which I believe are their last known addresses.

Amy Schwering
Federal Defenders of Eastern Washington
10 North Post, Suite 700
Spokane, WA 99201

UNITED STATES DISTRICT COURT
Eastern District of Washington

UNITED STATES OF AMERICA	**AMENDED JUDGMENT IN A CRIMINAL CASE**
V.	(Filed Aug. 10, 2005)
Ladel Baptiste Harrison	Case Number: 2:03CR00016-001
	USM Number: 32843-086
	Leslie R. Weatherhead
	Defendant's Attorney

6/17/05

☑ Correction of Sentence by Sentencing Court (Fed. R. Crim. P. 35(c))

☐

THE DEFENDANT:

☐ pleaded guilty to count(s) _____

☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.

☑ was found guilty on count(s) 1 of the Indictment after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. § 922(g)(1) &	Felon in Possession of a Firearm	12/06/02	1
18 U.S.C. § 924(e)	Armed Career Criminal		

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s)

_____

☑ Count(s) Superseding Indictment ☑is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

8/1/2005
Date of Imposition of Judgment

/s/ Robert H. Whaley
Signature of Judge

The Honorable Robert H. Whaley
Judge, U.S. District Court
Name and Title of Judge

8-10-05
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of: 235 month(s)

*The Defendant shall receive credit for time served.

☐ The court makes the following recommendations to the Bureau of Prisons:

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____.

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

_____
By DEPUTY UNITED STATES MARSHAL

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of: 5 year(s)

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

☑ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)

☐ The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or a restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

ADDITIONAL STANDARD CONDITIONS OF SUPERVISION

14. You shall not associate with known street gang members and gang affiliates.

15. You shall submit your person, residence, office, or vehicle to a search, conducted by a U.S. probation officer, at a sensible time and manner, based upon reasonable suspicion of contraband or evidence of violation of a condition of supervision. Failure to submit to search may be grounds for revocation. You shall warn person with

whom you share residence that the premises may be subject to search.

16. You shall undergo a substance abuse evaluation and, if indicated, enter into and successfully complete an approved substance abuse treatment program, including aftercare. You shall contribute to the cost of treatment according to your ability. You shall allow full reciprocal disclosure between the supervising probation officer and treatment provider.

17. You shall abstain from the use of illegal controlled substances, and shall submit to urinalysis testing, as directed by the supervising probation officer.

18. You shall complete a mental health evaluation and follow any treatment recommendations, including taking prescribed medications, as recommended by the treatment provider. You shall allow reciprocal release of information between the supervising probation officer and treatment provider. You shall contribute to the cost of treatment according to your ability.

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	$ 100.00		

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss1	Restitution Ordered	Priority or Percentage
TOTALS	$ 0.00	$ 0.00	

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest, and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

---

1 Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A ☑ Lump sum payment of $ 100.00 due immediately, balance due

☐ not later than _____ , or
☐ in accordance with ☐ C, ☐ D, ☐ E; or ☐ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or

D ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Case Numbers (including defendant number) and Defendant and Co-Defendant Names, Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, V. LADEL BAPTISTE HARRISON, Defendant-Appellant.	No. 05-30314 D.C. No. CR-03-00016-RHW **JUDGMENT**

Appeal from the United States District Court for the Eastern District of Washington (Spokane).

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Eastern District of Washington (Spokane) and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is **AFFIRMED**.

Filed and entered 05/08/06

2006 WL 1217888

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. LADEL BAPTISTE HARRISON, Defendant-Appellant.	No. 05-30314 D.C. No. CR-03-00016-RHW MEMORANDUM* (Filed May 8, 2006)

Appeal from the United States District Court
for the Eastern District of Washington
Robert H. Whaley, District Judge, Presiding

Argued and Submitted May 1, 2006
Seattle, Washington

Before: REINHARDT, McKEOWN, and CLIFTON, Circuit Judges.

Ladel Baptiste Harrison appeals his conviction of the offense of felon in possession of a firearm, 18 U.S.C. § 922(g), and his sentence under the Armed Career Criminal Act ("ACCA") on six grounds. We affirm.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

First, the appellant argues that the district court erred when it refused to instruct the jury that he faced a mandatory sentence of fifteen years to life if convicted. We have repeatedly held, however, that district judges should not instruct juries on the sentencing consequences of a verdict when the juries have no role in fixing punishment. *See, e.g., United States v. Frank,* 956 F.2d 872, 880-82 (9th Cir. 1992).

Second, the appellant argues that the felon in possession statute is unconstitutional both on its face and as applied because it exceeds Congress's power under the Commerce Clause. The facial challenge is foreclosed. *See United States v. Dorsey,* 418 F.3d 1038, 1046 (9th Cir. 2005); *United States v. Carrasco,* 257 F.3d 1045, 1053 (9th Cir. 2001). The as-applied challenge also fails. The evidence adduced at trial of the connection between interstate commerce and the firearm that Harrison allegedly possessed is more than sufficient to establish that the statute's application to the appellant does not violate the Commerce Clause. *See United States v. Gonzales,* 307 F.3d 906, 914 (9th Cir. 2002).

Third, the appellant argues that the district court erred in admitting evidence relating to the firearm obtained as a result of the search of Rebekah Durham's apartment. The law enforcement officers who conducted the search had probable cause to believe that Harrison lived there as a result of a corroborated tip from a confidential informant who had proven reliable in the past, and because of Durham's own statements. *See United States v. Elliott,* 322 F.3d 710, 715-16 (9th Cir. 2003); *United States v. Angulo-Lopez,* 791 F.2d 1394, 1397 (9th Cir. 1986). Through the confidential informant, the law enforcement officers also had reliable information that the

appellant had violated, or was in the process of violating, the conditions of his supervised release, in part by maintaining a weapon at his place of residence. Because the law enforcement officers conducted the search pursuant to a validly imposed condition of supervised release and because they had both probable cause to believe that the appellant lived in the apartment to be searched and reasonable suspicion that he was engaged in wrongdoing, the search did not violate the Fourth Amendment. *See Motley v. Parks,* 432 F.3d 1072 (9th Cir. 2005) (en banc).

Fourth, the appellant argues that the statements he made concerning his possession of the firearm were not given voluntarily. The district court's finding to the contrary is not clearly erroneous. *See United States v. Nelson,* 137 F.3d 1094, 1110 (9th Cir. 1998). In the absence of any evidence of threats or promises, there was no basis for suppressing the confession on the ground that it was the result of psychological coercion. *See United States v. Bautista,* 362 F.3d 584, 592-93 (9th Cir. 2004); *United States v. Tingle,* 658 F.2d 1332, 1335-37 (9th Cir. 1981).

Fifth, the appellant argues that he was improperly sentenced as an armed career criminal. His contention that a defendant must have at least four prior felony convictions in order to be subject to the sentencing enhancement under ACCA is erroneous. *See, e.g., United States v. Smith,* 390 F.3d 661 (9th Cir. 2004) (finding the defendant qualified for the ACCA sentencing enhancement on the basis of three prior felonies); *United States v. Wofford,* 122 F.3d 787 (9th Cir. 1997) (same). The appellant has three prior felony convictions that qualify as predicate offenses under ACCA, and he was therefore properly sentenced under that statute. Under Washington law, second degree assault with a deadly weapon, one of

the crimes of which the appellant was convicted, is categorically a "violent felony." Second degree assault with a deadly weapon – prohibited by Revised Code of Washington ("RCW") 9A.36.021(c) – necessarily involves the use of a device which "under the circumstances in which it is used, . . . is readily capable of causing death or substantial bodily harm." *See State v. Skenandore,* 994 P.2d 291, 293 (Wash. Ct. App. 2000) (quoting RCW 9A.04.110(6)). Accordingly, the offense *ex ante* presents "a serious potential risk of physical injury to another," and qualifies as a violent felony under the categorical approach. *See Wofford,* 122 F.3d at 792-94. The appellant's second degree assault with a deadly weapon conviction combined with his two drug convictions (which, he concedes, qualify as predicate offenses under ACCA) constitute the requisite three predicate offenses.

Finally, the appellant argues that his prior felony convictions must be pled in the indictment or proven to a jury beyond a reasonable doubt before his sentence can be enhanced pursuant to ACCA. We have repeatedly rejected this argument. *See, e.g., Smith,* 390 F.3d at 667.

Accordingly, the appellant's conviction and sentence are AFFIRMED.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA Plaintiff, vs. LADEL BAPTISTE ARRISON, Defendant.	No. 03-CR-016-RHW Spokane, Washington Appeal Transcript 2-22-05 Proceedings Volume 8 Pages 223-361

BEFORE THE HONORABLE ROBERT H. WHALEY
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff: Stephanie Lister
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Proceedings reported by mechanical stenography; transcript produced by computer-aided transcription.

* * *

[325] Now, that's just today, at 10:45. If you file something that convinces me it should come into evidence, you can revisit it. But I'm trying to get it resolved today as opposed to until next –

MS. LISTER: No. I – I agree, Your Honor. I was surprised, actually, that they hadn't filed a motion in limine on those issues far before midnight on Friday. But I will not, and I will direct the officers not to, talk about gang affiliations or the potential use of CI information about use of the weapon. Let's just not. Any other motions –

THE COURT: Any other motions in limine?

MR. WEATHERHEAD: No, Your Honor, although I've been reminded I owe you a paper on the government's motion. And all good intentions to the contrary to file it before midnight on Saturday, I didn't do that; and I would ask the Court's indulgence until 5:00 p.m. today to try to get you something to address that issue. That was on the potential penalty in this case.

THE COURT: Well, right now, you will not be permitted to refer to the penalty, unless you convince me otherwise. So those three motions are taken care of, subject to being renewed outside the presence of the jury.

MR. WEATHERHEAD: All right. Thank you.

MS. LISTER: And the only other that the motion in limine punishment issue might come up, then, is the jury [326] instructions. And we filed proposed

stipulated jury instructions with a large note that the defense objects to the punishment instruction that the government has proposed.

THE COURT: All right. That's a legal issue on instructions. So as far as evidence is concerned, there won't be any discussion of the penalty or gang assignments of the officers or affiliation or the alleged – anything that the informant said.

MS. LISTER: And just for clarification, Your Honor, I understand that the punishment will not be addressed in the evidence. But I'm also asking that defense counsel not refer to it in opening or closing arguments.

THE COURT: Well, Ms. Lister, I don't think he's going to argue something that's not in evidence. If he did, he would be wire brushed. I mean, it's not –

MS. LISTER: Well, my job as a prosecutor is to seek clarification.

THE COURT: Okay. Well, I –

MR. WEATHERHEAD: I'm happy to volunteer, Your Honor, I won't get near the topic. I intend to try to get near the topic, but I won't do it without prior notice to the Court and Counsel.

THE COURT: Right. He will not do it unless I've approved it.

Okay. Now, let's get to your motion to suppress.

* * *

[361] CERTIFICATE

I, DEBRA KINNEY CLARK, do hereby certify:

That I am an Official Court Reporter for the United States District Court at the Eastern District of Washington;

That the foregoing proceedings were taken on the date and at the time and place as shown on the first page hereto; and

That the foregoing proceedings are a full, true and accurate transcription of the requested proceedings, duly transcribed by me or under my direction.

I do further certify that I am not a relative of, employee of, or counsel for any of said parties, or otherwise interested in the event of said proceedings.

DATED this 15th day of August, 2005.

/s/ Debra Kinney Clark
Official Court Reporter
United States District Court
Eastern District of Washington

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA Plaintiff, vs. LADEL BAPTISTE HARRISON, Defendant.	No. 03-CR-016-RHW Spokane, Washington Appeal Transcript 2-28-05 Proceedings Volume 3 Pages 362-387

BEFORE THE HONORABLE ROBERT H. WHALEY
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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Proceedings reported by mechanical stenography; transcript produced by computer-aided transcription.

* * *

[367] (February 28, 2005; 1:00 p.m.)

THE COURTROOM DEPUTY: We have *United States of America v. Harrison*, Case No. CR-03-016.

THE COURT: Counsel, I'm giving you a copy of the instructions so you have them. But we can talk about the objections. I'm not asking you to make them now or saying that I won't change my mind. But those will at least give you a starting point.

Before we started, I was advised by the marshals that no one had brought any other clothes for the defendant to wear; and so I had Counsel in chambers, meeting to see if any of the clothes that I have in my chambers would fit the defendant so that he wouldn't be dressed in the overalls from the jail. And the defense concluded that it was consistent with the manner in which they wanted the case presented that he be dressed as he is, so I did not wait for any other clothes to be delivered or for mine to be used.

Mr. Weatherhead then – the prosecutor brought up a filing by Mr. Weatherhead or the defendant's attorney concerning the discussion of punishment, and the Court stated that the punishment for this offense would not be discussed unless it was previously ruled on by me. And I was asked if other comments about punishment could be made, and the conversation went that I had in the past and didn't think it was inappropriate when I was a lawyer or now, as a judge, to let [368] the jury know that the offense was a felony, which there wasn't any more serious offense under federal law or state law than a felony, and

that that was permissible; but the actual offense – the punishment for this offense wasn't to be referred to by either party without a prior ruling.

Then the subject came up about the Court was not permitting an expert to testify about the absence of prints on the gun. That was what was presented to me as the proposed expert testimony, was to explain why there would not be prints found on a gun; and I excluded that. I was then asked by Ms. Lister if that ruling included a statement that there were no prints found on the gun, which was different than why there wouldn't be; and my conclusion was that was not covered by my prior ruling. But Mr. Weatherhead objected to that testimony, so I then said let's go out in the courtroom with the court reporter.

Mr. Weatherhead, does that summarize what we did so far?

MR. WEATHERHEAD: Very fairly, Your Honor. Thank you.

THE COURT: Ms. Lister?

MS. LISTER: Yes, Your Honor.

THE COURT: Okay. Go ahead, Mr. Weatherhead.

MR. WEATHERHEAD: My understanding was, Your Honor, that –

THE COURT: Use the podium.

* * *

[387] CERTIFICATE

I, DEBRA KINNEY CLARK, do hereby certify:

That I am an Official Court Reporter for the United States District Court at the Eastern District of Washington;

That the foregoing proceedings were taken on the date and at the time and place as shown on the first page hereto; and

That the foregoing proceedings are a full, true and accurate transcription of the requested proceedings, duly transcribed by me or under my direction.

I do further certify that I am not a relative of, employee of, or counsel for any of said parties, or otherwise interested in the event of said proceedings.

DATED this 15th day of August, 2005.

/s/ Debra Kinney Clark
Official Court Reporter
United States District Court
Eastern District of Washington

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA, Plaintiff, vs. LADEL BAPTISTE HARRISON, Defendant.	No. 03-CR-016-RHW Spokane, Washington Appeal Transcript 3-01-05 AM Proceedings Volume 10 Pages 388-588

BEFORE THE HONORABLE ROBERT H. WHALEY
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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Proceedings reported by mechanical stenography; transcript produced by computer-aided transcription.

* * *

[396] THE COURTROOM DEPUTY: I do, Your Honor.

THE COURT: And then you can call your first witness.

MS. LISTER: Thank you, Your Honor.

Judge, we had a little problem with the computer this morning; and so I left my lap top on the podium. And it kind of takes a while to move down, et cetera. Is it okay if I just close it up? You can use it too, if you want.

MR. WEATHERHEAD: Does it have Space Invaders on it?

(Laughter.)

MR. WEATHERHEAD: No. That's very kind of you.

MS. LISTER: And if you want me to move it, just let me know.

THE COURTROOM DEPUTY: Amber is lining them up.

(Jury in.)

THE COURT: You may recall I told you earlier that one of the ways that things are proven, in addition to testimony and the like, is that the parties can agree to something – the facts; and that's called a stipulation. And you're to – when that occurs, you're to take those matters as if they were established by the agreement of the parties. So I'm going to read you a stipulation.

It is hereby stipulated and agreed between the underlying parties and counsel that as of December 6th, 2002,

and at all times thereafter, the defendant, Ladel Baptiste Harrison, had previously been convicted of a crime punishable by imprisonment [397] for a term exceeding one year in King County Case No. 96-1-03433-5 on September 13, 1996. The jury may accept this stipulation as a proven fact, without any further testimony or proof.

Did everybody hear that? All right. You won't get a copy of this, so you'll have to remember it.

You can call your first witness.

MS. LISTER: Thank you, Your Honor. At this time, the government calls Corrections Officer Thompson.

THE COURTROOM DEPUTY: Sir, can I have you stand up against the door real quick to get a picture for the jury, please?

(The witness's picture was taken.)

THE COURTROOM DEPUTY: Please raise your right hand. (WITNESS, MATTHEW THOMPSON, called as a witness on behalf of the plaintiff, having first been duly sworn, testified as follows:)

THE COURTROOM DEPUTY: Please have a seat. And if you'll state your name; and spell your first and your last name for the record, please.

THE WITNESS: My name is Matthew Thompson, M-a-t-t-h-e-w T-h-o-m-p-s-o-n.

* * *

[426] out of his apartment and didn't have a home. Right?

A He indicated he wasn't sure where he would be staying at.

Q Now, you went to the 619 Tavern to participate in the arrest of Mr. Harrison?

A That's correct.

Q Was Mr. Harrison – at that time, he was cooperative with you at all times?

A Yes, he was.

Q Nobody had to threaten Mr. Harrison to get him to do what was desired of him?

A I don't recall any threats. He was given verbal directives.

Q And he complied?

A And he complied.

Q And at different times, you talked to him and asked him questions; and he answered?

A That's correct.

Q Now, when you found the firearm in the apartment where he was staying, you considered that he was in possession of that firearm. Right?

A I considered that it appeared to me that he was in possession. I notified law enforcement for them to continue the investigation for the new crime. But for a probation violation, constructive possession is less than a new crime. We only need to prove preponderance. And so at least as for a [427] violation, for my purpose, it appeared that he was in violation.

Q And you pursued that, and he was punished for that violation in the state system; right?

A That is correct.

Q I think you told us before that he got 55 days of state time?

A That's correct.

Q And then a referral was made to the federal government?

A It appears so. Yes.

Q And further punishment is now sought in the federal court?

A It appears so. Yes.

Q And just so the jury understands, from December 6th of 2002 to today, Mr. Harrison has been incarcerated. Right?

A To the best of my knowledge, that's correct.

Q That's two years that he's been incarcerated in relation to this crime. Right?

A That's correct.

Q Now, you were there, weren't you, when Mr. Richmond questioned – or – I guess it's Detective Richmond – questioned Mr. Harrison?

A I was at the apartment, but I did not overhear the questioning.

Q All right. Did you understand at any time that Mr. Harrison had obtained this gun for protection?

* * *

[519] occasions. He also stated that he visited the residence all the time.

I then went into – I asked him how he had obtained the firearm that was found at the residence. He initially stated the firearm did not belong to anyone. I then spoke with him again about what he had originally told Detective Richmond in his first statement the day of his arrest; and Harrison stated that everything he told Detective Richmond was true, except the firearm was actually brought over to the residence by another individual. He stated that the individual that brought the firearm to the residence wanted to buy a radio that Harrison had owned. He stated the individual didn't have any money to purchase the radio. Harrison told me that he gave the radio and $20 to this individual for the firearm and that the individual who provided him the firearm in trade for the radio and the $20 left it on the kitchen cabinet. He also stated that the transaction with the firearm the radio and the $20 occurred approximately two months previous to the date that I was interviewing him.

He stated that the firearm had been sitting on the cabinet for the last two months. He told me that he had handled it eight to ten times during that time frame. He stated that he would occasionally take the firearm down and look at it. He told me that he never had taken the firearm from the residence and he never used it in a drug trafficking crime. He told me [520] that the last time he handled the firearm was approximately four days prior to his arrest.

Q Now, did you write that information down in any kind of report?

A Yes.

Q And is that what you're referring to?

A Yeah. I referred to it to refresh my memory, because this happened so long ago, so I can remember exactly the statements he told me that day.

Q When did you write your report?

A I wrote that report December 16th, 2002.

Q Did you ask Harrison if Rebekah Durham knew if the firearm had been at the residence?

A I don't recall if I had asked him or if he provided that to me on his own. But he told me that Rebekah knew the firearm had been at the residence. However, she did not know that it was still there when he was arrested.

Q Did you ask Harrison what type of weapon it was?

A Yes, I did. He stated that it was a 9mm caliber and that it held approximately eight to nine rounds of ammunition.

Q Now, was a recording made of this oral interview that you had with Mr. Harrison?

A Not an audio recording. But I asked him to complete a written statement, sworn statement.

Q I'm going to hand you what's been marked as government's

* * *

[544] weapon?

A Yes.

MR. WEATHERHEAD: Objection. Foundation, Your Honor.

THE COURT: Overruled.

A Yes, I do.

Q (By Ms. Lister) Okay. And what is your opinion?

A My opinion is that a retail price for a firearm like this in new condition is approximately $137, and I would grade this pistol as about 95 percent. And the Blue Book says this pistol is worth $80. That would also be my experience.

Q And what's the basis of your opinion?

A The Blue Book of Gun Values is where I got the exact figures. But I've also seen this type of pistol for sale in retail – at retail, at gun dealers, and also in a used condition at federal firearms dealers, and also seen them at gun shows. And the price of approximately $80 would be a reasonable price to pay for this pistol.

MS. LISTER: No further questions of this witness, Your Honor.

THE COURT: All right.

MR. WEATHERHEAD: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. WEATHERHEAD:

Q Agent Jessen, you said you've testified 30 times, about, as a nexus expert?

[545] A Yes.

Let's tell the jury – what is a nexus? What's that mean?

A That means some relation to.

Q And when you say interstate nexus, you're referring to the fact that the government has to prove in this case that this gun traveled or affected or was in interstate commerce?

A That's correct.

Q In the 30 times that you've testified as an expert on nexus, did you ever testify for a defendant?

A No.

Q Always for the prosecution?

A That's correct.

Q And in the 30 times that you've testified as an expert for the prosecution, have you ever offered an opinion that there was no nexus?

A No.

Q Who has owned this gun in the state of Washington?

A I can tell you who possessed this firearm in the state of Washington. I can't tell you who owned it because I don't know.

Q All right. You're going to say Mr. Harrison possessed it?

A That would be hearsay.

Q All right. Who else? Hearsay or nonhearsay, who else would you say has possessed the gun in the state of Washington?

A I don't believe I know who else would have possessed this [546] gun in the state of Washington.

Q Do you know how many people in the state of Washington would have possessed this gun?

A No, I don't.

Q Do you have an opinion as to whether, as we sit here today, this gun is in commerce?

A I do have an opinion that this firearm has affected interstate commerce.

Q All right. Let's talk about that. How did it affect interstate commerce?

A It has traveled from the manufacturer, Beemiller, in Mansfield, Ohio. It traveled to M.K. Supply, Incorporated, in Dayton, Ohio. It then moved on approximately April 30th, 1997, to Chaplin, South Carolina. And then it moved in interstate commerce on May 27th, 1997, to Billings, Montana.

Q All right. Now, you've told me where you think it's been. Let's talk about that for a minute. You're referring to some hearsay documents that you looked up related to the serial number on the firearm?

A Yes. I'm talking to the – about specifically the ATF National Tracing Center tracing the history of this particular firearm.

Q And you're not the custodian of those ATF records?

A I am not.

Q And you're not able to testify as to the accuracy of those [547] records or the practices related to the keeping of those records?

A I can tell you about some of their procedure. I could not tell you about all of it.

Q With respect to the specific records you were referencing, you weren't the custodian of those and don't know the circumstances in which they were made?

A I can tell you that I received these records directly from the national tracing center.

Q All right.

MR. WEATHERHEAD: Your Honor, I would move to strike the hearsay in the witness's responses unless and until a foundation for those records is laid under the hearsay rule.

THE COURT: You asked the question as to what he knew, and he's told you.

MR. WEATHERHEAD: Sure.

THE COURT: If you wanted to restrict the source of his knowledge, you could have. Overruled.

MR. WEATHERHEAD: Your Honor, respectfully – well, I won't argue with you, Judge.

THE COURT: All right.

Q (By Mr. Weatherhead) My question was, actually, with all due respect to His Honor, not where the gun had been. My question was how had it affected commerce. And I don't think I've heard that yet. How did it affect commerce?

[548] A This firearm has moved from a point in Ohio to any point in any other state; and in this case, it was Spokane County, Washington.

Q All right. Forgive me for being obtuse. How did it affect commerce? It moved. Okay. We get that from some hearsay records. But how did it affect commerce?

MS. LISTER: Objection, Your Honor. Misstates the law. The law is that the government has to prove sometime prior to possession that the firearm had traveled in interstate commerce.

MR. WEATHERHEAD: Your Honor –

MS. LISTER: Nothing in the Ninth Circuit requires affect.

MR. WEATHERHEAD: Well, we'll get to arguing the law to Your Honor later, I suppose. I'm asking the witness as to his knowledge to get to the foundation of his opinion, Your Honor.

THE COURT: Well, let me explain to you – you're going to ultimately get some jury instructions that tell you what the elements of this offense are and what the requirement is with respect to interstate commerce. I don't believe, but I'm not telling you that right now, that the words "affect commerce" are going to be in the instructions. But I

am going to permit him to ask this question. But you should understand that ultimately, the jury instruction as to what you have to [549] find will control this subject.

Q (By Mr. Weatherhead) So movement? That's it, as far as you know, in terms of affecting commerce? It came from Ohio to Washington?

A That's the base definition.

Q All right. Any other facts that you're aware of as to affecting commerce beyond that movement?

A I would say that the net value of all of the goods and services in the state of Washington were increased by about $80 when this firearm moved into the state of Washington. This value – the value this pistol had – approximately $80.

Q So you say that there was an effect on commerce in the state of Washington in the amount of 80 bucks?

A Approximately.

Q Don't know that anybody paid 80 bucks for the weapon?

A I do not.

Q The only evidence we have is that the defendant traded it for a radio and 20 bucks?

A Yes.

Q But we don't know how many Washingtonians had it before it came to the defendant?

A That's correct. I don't know that.

Q At your nexus school, did they teach you about the coming to rest doctrine as that relates to interstate commerce?

A I don't recall that.

[550] Q I guess the question would be: Do you have an opinion as to whether something that enters commerce in our law is deemed always to be in interstate commerce? Or does it stop being in interstate commerce at some point? If you don't know, that's a reasonable answer too.

A I don't have an opinion.

Q Fair enough. Now, let's go through your opinion as to where you do have an opinion. You say the markings on the gun tell you that the gun was manufactured in the state of Ohio. Any other evidence tell you that that gun was manufactured in the state of Ohio?

A Yes. I can tell you that this firearm is consistent with other Hi-Point, Model C, 9mm pistols that I've had a chance to examine in the past.

Q Well, it looks like a Hi-Point.

A It certainly does.

Q And the other Hi-Points you've seen had markings that tell you that they came from Ohio?

A That's correct.

Q Ever been to Ohio?

A Yes.

Q Ever been to the Beeline (sic) Manufacturing Company?

A I've never been to the Beemiller Manufacturing Company.

Q My mistake. Beemiller. And I guess, for the court reporter, that's B-e-e-m-i-l-l-e-r?

[551] A That's correct. Incorporated.

Q So you took no steps to validate that even though this gun says Beemiller on it that it really did come from Beemiller?

A Oh, I did. I viewed the trace which Detective Ricketts submitted.

Q All right. And the trace tells you, based on some information that we can't verify because we don't have a witness to do it, that the serial number on that gun purportedly traces back to Ohio.

A Correct. The make, model, and serial number trace back to the manufacturer, Beemiller, Incorporated, who keeps records and says that they produced this pistol and they transferred it.

Q Well, you've been here through the entire trial; correct?

A Yes, I have.

Q And no witness was produced from Beemiller to testify that they keep records that say that they made that gun. Right?

A That's correct.

Q No witness has been present from the ATF to say that they keep records whose accuracy they can attest to that show that gun originated in Ohio. Right?

A Correct.

Q In fact, I suppose there are things we could do. We could run metallurgical tests on a gun to see whether the metal in its manufacture is consistent with metal known to be used by [552] Beeline – Beemiller? We could do that?

A Yes.

Q And that's not been done?

A Correct.

Q And I suppose we could examine the dies. You know what a die is?

A Yes, I do.

Q What's a die, just so the jury is with us?

A The markings on pistols like this would normally be applied with some sort of a stamp. In most cases, and I believe in this one, the die is a roll mark. It's normally applied on some sort of a round die, and it's rolled under great pressure on the side of the slide in order to make the markings on the slide which are the markings that I've previously read.

Q And we could have had a witness testify that they're familiar with Beemiller's die and testify that the toolmarks – the markings on this gun were produced by that die?

A Could we have?

Q Yes.

A Yes. We could have.

Q But we didn't.

A No.

Q Are the slides on guns interchangeable?

[553] A Yes, they are.

Q So that if this pistol had been taken to a repair shop, could the slide have been changed out with another slide?

A It's possible.

Q In fact, you came to your opinion – you came to your conclusion that this gun traveled in commerce before you ever saw the gun. Right?

A That's correct. On a description – a particular description by Detective Ricketts.

Q So you talked to Detective Ricketts I'm guessing on the phone?

A No. I saw him in person.

Q And he didn't have the gun with him at that time?

A No, he did not.

Q And just so we're clear, this was on February 15th of this year?

A Correct.

Q And you didn't examine the gun physically until the next day, the 16th. Right?

A That's correct.

Q And on the 15th, you did a report in which you expressed your conclusion, based solely on the description,

that this gun had traveled in interstate commerce. Correct?

A That's correct.

Q And the description that he gave you was he told you what [554] was stamped on the gun. Right?

A Correct.

Q To include the serial number?

A Yes.

Q And what else? That it was an automatic pistol?

A Yes. He told me it was a semiautomatic pistol. He told me the make, model, and serial number of the firearm, and the manufacturer.

Q Based on that, it was your opinion that the weapon had traveled in interstate commerce?

A That's correct.

Q Now, there is a market in knock-off guns, isn't there?

A Not a very big market.

Q I'm going to take that as a yes. Was that a yes, Agent?

A Yes.

Q It's possible that this gun is a knock-off, isn't it?

A It is not.

Q Not possible?

A I don't believe so, with the means available to Mr. Harrison.

Q All right. Mr. Harrison couldn't have manufactured this gun?

A I don't believe he could have.

Q But the ATF keeps records on gun manufacturers within the state of Washington. Right?

[555] A Yes.

Q And there's 22 of them, aren't there?

A I don't know exactly how many there are.

Q 22 sound about right?

A I don't know.

Q If I told you that I got that off of the – are you familiar with the Violence Policy Center?

A No.

Q You don't know about their publications from ATF records?

A No.

Q All right. If I told you that the Violence Policy Center says that they did a Freedom of Information Act request of the ATF and learned that there were 22 gun manufacturers in the state of Washington, would you quarrel with that?

A No. I'd let you tell me that.

Q All right. And I guess it may be obvious to us but maybe not to the jury. The ATF keeps records on legal gun manufacturers. Right?

A Yes.

Q There are – in addition to the gun manufacturers about which the ATF has records, there are also illegal gun manufacturers. Right?

A Yes.

Q And a manufacturer that was planning on violating somebody else's trademark by doing a knock-off would probably, in your [556] experience, been an illegal gun maker. Right?

A Not necessarily.

Q Okay. Does the ATF have estimates as to how many manufacturers of pistols there are in the state of Washington that are operating outside the law?

A No. That would be – part of my job is if I found those people, I should put them out of business. And if it's criminal – you know – prosecute them.

Q I agree the ATF, if it knows about them, will shut them down. My question is: Does the ATF, to your knowledge, have estimates as to how many places there are that are illegal manufacturers of weapons?

A No.

Q And it's true, isn't it, that manufacturers and dealers are not always scrupulous about keeping records consistently with ATF requirements? Isn't that true?

A Is the question that some manufacturers and dealers don't comply fully with the regulation and the law?

Q Your phrasing is way better than mine. Yes. That was my question.

A Yes.

Q Now, who is, if you know, Cheryl Glenn?

A Cheryl Glenn is an agent out of Portland, Oregon.

Q Is she an agent with your agency?

A Yes, she is.

[557] Q Is she also an interstate nexus expert?

A Yes, she is.

Q And were you aware that she had testified in this very courthouse that it is possible to counterfeit a Hi-Point, 9mm, Model C?

A I wasn't aware of that.

Q If she did, would you argue with her?

A With some explanation.

MR. WEATHERHEAD: All right. That's all I have.

MS. LISTER: Objection, Your Honor. He has misstated that witness. He refers not to what trial, does not provide –

THE COURT: I can't hear you.

MS. LISTER: He has attempted to impeach this witness with the testimony of another witness. This

witness doesn't have this testimony. He hasn't said what court, what –

THE COURT: It's a little late for your objection, but –

MS. LISTER: Well, I just kind of – I was amazed. I object.

MR. WEATHERHEAD: I'm testing the scope of the expert's knowledge.

THE COURT: Well, do you have whatever it is you're referring to?

MR. WEATHERHEAD: I do.

THE COURT: All right. Well, maybe get it out and [558] show it to Ms. Lister.

MR. WEATHERHEAD: Ms. Lister was there, Your Honor. She's perfectly familiar with it.

THE COURT: Well, you don't need to comment, Mr. Weatherhead. I haven't seen it and have no idea what it is. So show it to counsel, and they can show it to me.

(Counsel conferred off the record.)

MR. WEATHERHEAD: I have no further questions, Your Honor. Thank you.

THE COURT: Well, I haven't ruled on this objection yet. I don't know what it is we were looking at. Are you renewing the objection or are you withdrawing it or what, Ms. Lister?

MS. LISTER: Your Honor, it's still improper impeachment; and I object.

THE COURT: Well, I've got to look at what we're talking about to rule on that.

MR. WEATHERHEAD: It wasn't impeachment, Your Honor. I was asking him –

THE COURT: Well, I want to look at what you're talking about.

MR. WEATHERHEAD: I'll approach, Your Honor. I'll be happy to give it to you.

THE COURT: Give it to Ms. –

MS. LISTER: Your Honor, I'd like a copy of that; and [559] I need to see that. I remember now. But that was a trial I did – I don't know –

THE COURT: Well, I don't know what it was.

MS. LISTER: – a year and a half ago.

THE COURT: So let me look at it and see what we have.

(Materials were handed to the Court.)

THE COURT: All right. Go ahead and state your objection.

MS. LISTER: The objection is it's improper impeachment. That's not the context of what the witness said, Your Honor. If you look at the entire transcript, it's possible but not probable. And she did not conclude that the weapon had been counterfeited in the *Weiland* case.

MR. WEATHERHEAD: I never suggested otherwise. My question was –

THE COURT: Just a minute. Just a minute. The question, as I recall – and I don't want to get it read back, necessarily – was whether – if she testified it's possible that a 9mm Hi-Point could be manufactured – counterfeited in Washington and she said yes, would he disagree with that. And I think he answered that. I think that's what the testimony – the question and answer were.

MS. LISTER: And I would just object, because my recollection is the witness testified possible, not probable, [560] and explained why not. But I can – I can go through that with this witness.

THE COURT: All right. Well, I've read the transcript; and I think there was a foundation for the question. The objection was late, after it had been answered; and I'm going to overrule the objection. Go ahead.

MS. LISTER: Okay.

REDIRECT EXAMINATION

BY MS. LISTER:

Q The weapon in this case – what's the value of it?

THE COURT: He's already testified to that. You don't need to ask it again.

MS. LISTER: Okay.

Q (By Ms. Lister) It's about $80; is that right?

A That's correct.

Q Okay. How much would it cost, based upon your training and experience, to manufacture a counterfeit 9mm weapon like the type we have today?

MR. WEATHERHEAD: Objection. No foundation.

THE COURT: Sustained, without further foundation.

Q (By Ms. Lister) Have you ever testified with respect to counterfeiting of weapons and their possibilities?

A Yes.

Q And have you received training with respect to the counterfeiting of weapons?

* * *

[574] to add a definition.

THE COURT: Let's see. The elements doesn't refer to – it does – it says possession of a firearm, and then it uses the word "handgun". So what you're saying is you have to have some instruction that says what a firearm is. And your instruction says what?

MS. LISTER: My instruction says a firearm is any weapon which will or is designed to or may be readily converted to expel a projectile by the action of an explosive.

THE COURT: All right.

MS. LISTER: That's the clear language in my instruction.

THE COURT: All right.

MS. LISTER: And I don't know if you could add it to your 8 if you were so inclined. But other than that, Your Honor, I had no objections to the jury instructions.

THE COURT: Okay. Mr. Weatherhead.

MR. WEATHERHEAD: Thank you, Your Honor. As to Instruction 8, Your Honor, I want to reserve an objection; and I want to be correct about this. It's my contention that after *Lopez* and *Morrison*, more than mere possession of an object that once upon a time has been in commerce has to be shown. However, I'm bound to point out to the Court that there's a Supreme Court case called *Scarborough* which says that, in fact, historical travel in interstate commerce is all that has to be [575] shown. And there's a Ninth Circuit case called *Casterline* that says – it raises a question as to whether *Scarborough* is still good law after *Lopez* and *Morrison, Morrison* being the Violence Against Women Act and *Lopez* being the School Zones Act. It raises a question as to whether *Scarborough* is good law. But it concludes that until the Supreme Court explicitly overrules *Scarborough*, the Ninth Circuit isn't going to read *Lopez* and *Morrison* to have implicitly overruled *Scarborough*.

So what I'm trying to do is – I want my record to reflect that I want a stronger instruction on interstate commerce. I am formally asking that the jury be instructed that this gun has to have been shown to have been in commerce at the time or to have substantially affected commerce at the time of the offense.

THE COURT: Do you have a proposed instruction that does that?

MR. WEATHERHEAD: I didn't bother, Your Honor, because I'm bound to tell you that you're not bound to give it, after *Casterline*. I'll write one up if that formality is required.

THE COURT: Well, I'm satisfied if you are. But the Circuit may say that they're not going to review it because you didn't have a proposed instruction. Now, it may well be that the way to preserve is to say that the action should be dismissed because – under lack of proof that –

[576] MR. WEATHERHEAD: I was going to get to that. We haven't had an opportunity for Rule 29 motions –

THE COURT: Right.

MR. WEATHERHEAD: – and I'm certainly going to ask for that, Your Honor. But anyway, we'll submit something before the close.

THE COURT: All right. So the record is here, I don't have an alternative instruction to substitute for this; and the defense is suggesting that this is a proper statement of the law, at least as it exists under precedent, without the Supreme Court revisiting the issue. But the defense contends that it may well be revisited at some point, and it wants to preserve that in the case. I find that I understand that and could write an instruction, perhaps, that would do that, although I haven't, and obviously haven't submitted it to the parties. So if that's good enough to preserve it for appeal, I'm not objecting to it. But I don't know if it is or not.

MR. WEATHERHEAD: Thank you, Your Honor. Likewise, as to Instruction 11, we had proposed a more – a

more colorful reasonable doubt instruction. It's the one frequently used by Judges Quackenbush and Van Sickle. I again –

THE COURT: Is that one used by Quackenbush and Van Sickle?

MR. WEATHERHEAD: Last time I tried a case to either of them, it was, Your Honor.

[577] THE COURT: Is that true, Ms. –

MS. LISTER: I'm sorry. I didn't hear what he said. Ms. Lister.

THE COURT: I know. I do that with Ms. Fox. I'm sorry.

Does Judge Quackenbush and Judge Van Sickle use the reasonable doubt instruction that the defense filed? You would know that.

MS. LISTER: I will look at his instruction.

THE COURT: It's the one that talks about the clean slate and all that.

MS. LISTER: No. I think they use this one about presumption and common sense and things. No, I don't know, but I would recognize clean slate. But – you know – that's what I recall. Mr. Weatherhead could be –

THE COURT: Well, I'll tell you what. I'm going to try to find out.

MR. WEATHERHEAD: All right, Your Honor.

THE COURT: The one thing that I'm worried about is I know that the Circuit found – no. I shouldn't say

that. I believe the Circuit found one of the sort of traditional older reasonable doubt instructions to be in error in the last ten years. I don't know if it's the one – I wouldn't think that those two judges would be giving one that's in error, but the one I have I know is right out of the pattern instructions from [578] the Circuit.

MR. WEATHERHEAD: My recollection of the relevant ruling of the Ninth Circuit and what I was about to say, because I'm ethically bound to say it, is I believe 11 comports with the Circuit's view of what is satisfactory. I believe the Court has discretion to use an alternative one. I was not aware that what we had proposed – I'm not aware of any error in the one that we had proposed, just that you can't be reversed for having refused to give it, if that's what you do. Thank you, Your Honor.

THE COURT: All right. What is your position on including the instruction that defines a firearm?

MR. WEATHERHEAD: I think it's a necessary element in the offense, and I was hoping the government would overlook it.

THE COURT: All right. I think we should give it. All right. So the – what was the government's exhibit – well, all right.

I think what I'm going to do is keep the instructions as they are and add this other one. You can assume that's what's going to happen – that I'm going to add the definition of a firearm and keep the instructions as they are. If I change anything, I'll let you know before 3:00 so you'll know that.

Now, how much time do you want to argue your case?

MS. LISTER: 30 minutes.

THE COURT: All right. Does that include rebuttal?

[579] MS. LISTER: No.

THE COURT: How much do you want for rebuttal?

MS. LISTER: Ten.

THE COURT: All right. Then you'll both get 40 minutes. Is that enough for you, Mr. Weatherhead?

MR. WEATHERHEAD: Yes, Your Honor.

THE COURT: All right.

MS. LISTER: I don't think I'll really use all that, but –

THE COURT: Well, I know. But I'm going to cut you off at the end of 40.

MS. LISTER: I understand.

MR. WEATHERHEAD: At some point, I do need to put a Rule 29 motion on the record, Your Honor.

THE COURT: Why don't you do that?

MR. WEATHERHEAD: All right. Three points, Your Honor. And I've sort of halfway made one of them as to the nexus in interstate commerce. I don't think that there's been a sufficient showing of a nexus to interstate commerce to convict in this case, subject to the reservation that the state of the law is still *Scarborough*. But I want to ask for an acquittal based on the failure of proof that this gun was in commerce at the time that Mr. Harrison

allegedly possessed it or that it had any substantial effect on interstate commerce at the time he possessed it, allegedly. So that's point one.

[580] Point two, I'm bound to make a record – I'm bound to ask for acquittal based on the fact that there was no evidence that this weapon was stolen. The state of this record is is [sic] that Mr. Harrison was indicted for a violation of 922(g) of 18 United States Code; and then there was an information superseding indictment under 922(i), I believe it was, alleging possession of a stolen weapon. Mr. Harrison entered a plea of guilty to the 922(i) violation. That plea was vacated, and we went to trial. So if the operative pleading is the information superseding indictment, I'm entitled, I think, to ask for acquittal of Mr. Harrison on that basis, there having been no evidence that this firearm was stolen.

Finally, Your Honor, I have a motion that, as a matter of law, there is insufficient evidence of interstate commerce, even under the *Scarborough* test, that test being that the gun simply at some time in its history traveled in interstate commerce.

What we have is an opinion that is patently based on the fact that the gun has stamped on it that it came from Hi-Point Manufacturing in Ohio. That opinion was rendered before the expert ever even saw the gun. It was rendered from the mere fact that the gun bears that stamp.

I've examined the case that Ms. Lister was good enough to give me, and I will grant that the Ninth Circuit has said that the hearsay is admissible under Rule 902 as to stamped [581] statements of origin on an item. That

rule does not say, however, that such evidence is sufficient to convict beyond a reasonable doubt.

In this case, Your Honor, if the government wants to impose, as it says it does, a sentence of not less than 15 years on Mr. Harrison, it seems to me that it is incumbent upon the Court to hold the government scrupulously to its burden of proving beyond a reasonable doubt. There is evidence from the government's expert from which a fair-minded jury could conclude that this gun could have been manufactured in the state of Washington, that the body of the gun could have come from elsewhere and the slide switched out. Now, it's true that the witness, the expert witness for the government, said he didn't think there was much of a doubt on that score; but he did say that there was that possibility.

So based upon that, Your Honor, the government having failed to produce any evidence to lay a foundation for that stamp, which it could easily have done – it could have called a witness from the manufactory to say, yup, we made a gun at our foundry with that serial number on there. It didn't. It could have called an ATF custodian to come in and say, yup, we are the custodians of the records that show that this item was manufactured on this date and entered commerce on that date. It elected not to do that. The government made its choices and ought to be held to the consequences of its choices, and [582] Mr. Harrison ought to be acquitted.

THE COURT: All right.

MR. WEATHERHEAD: Thank you, Your Honor.

THE COURT: Ms. Lister?

MS. LISTER: I'll deal first – I'll just handle these in the order that they were presented by Mr. Weatherhead.

His first argument is that the interstate nexus information provided by the government does not meet the *Scarborough* test. I think before, obviously, looking at these Rule 29s, the standard is that we view the light in the – we view the evidence in the light most favorable to the government. In deciding interstate nexus, the *Scarborough* test requires – I think it's met, according to Ninth Circuit law. In cases – in the case of *United States v. Simmons* – no – strike that – *United States v. Patterson,* P-a-t-t-e-r-s-o-n, 820 F.2d 1524, at 1526, the Ninth Circuit in 1987 found that the commerce nexus is satisfied by evidence that a handgun that was found in the defendant's possession in California bore an imprint that it had been manufactured in Florida.

In this case, you have evidence from Special Agent Jessen, and also the evidence speaks for itself, that it bears an imprint of a manufacturer in Ohio. Moreover, you have testimony from Special Agent Jessen, who testified as an expert that it does satisfy the interstate nexus requirements because it was manufactured in Ohio; and his trace indicates it went [583] from Ohio through several other states before arriving in Washington. So I'd ask the Court to deny that motion.

The second motion made by the defendant is the 922(g) aspect and whether or not that changes in light of *Lopez.* That, I think, has been – that objection has been made before by defense attorneys. It has uniformly failed. I know it failed in the Fifth Circuit, Sixth Circuit, Eleventh Circuit, Seventh Circuit, D.C. Circuit. I did not know

that was going to be raised as an issue. I didn't Shepardize that particularly, but I know that that and the *Morrison* challenge I believe was rejected *United States v. Jones.*, 231 F.3d 508 (9th Cir. 2000). So, Your Honor, I think that there is sufficient information to establish that there was sufficient nexus.

The argument that this case has changed from a 922(g) to the charge of a 922(i) – that's new. I have not heard that. I would argue that the 922(g) is still the operative pleading because the 922(i) plea agreement was withdrawn. The defendant withdrew his plea agreement, thus put back into effect the 922(g) indictment. He's obviously on notice of that. He was advised of that when the trial began. So, again –

The fourth argument is insufficient evidence of interstate commerce because of – I guess there's a possibility that it might be manufactured. Obviously, the testimony in this case was that there is a possibility; but that's not probable. And [584] ~~I think~~ when we view that in the light most favorable to the government, the Court can reject that.

One last item – and I ask for the Court's indulgence. I know the jury instructions are done. I know I asked for the firearm definition to be added. I do think it should be. But I really hesitate to have it added as an additional instruction, because I think the jury is going to put undue weight on that instruction, then – an undue emphasis on that instruction. And when there's an issue of – you know – is the gun counterfeited, is it really a – you know. Does that then lead you to wonder whether or not it's actually a firearm? I don't think that the question of whether or not it's actually a firearm is in dispute, but I hate to have

undue emphasis placed on a jury instruction. I would request that, if we could, we just insert that sentence on that particular instruction. And I know that's difficult. But that's all I have, Your Honor.

THE COURT: All right. Anything else, Mr. Weatherhead?

MR. WEATHERHEAD: No, Your Honor. Thank you.

THE COURT: The first thought that – it's the first time its been raised to me, so its the first time I've thought about it – about which charge was being tried – was in the motion that suggests the superseding indictment charges a stolen firearm – what we have, from me looking at my bench [585] notebook, is one indictment that was returned on – or at least filed on January 24th of 2003 and then a superseding information filed on July 10th, 2003, which I believe was done in connection with the plea agreement. I don't know that, because I don't have the plea agreement in the file; but I think that's true.

Either from the trial brief or from some other source that I can't recall, I concluded this case was being – was proceeding on the basis of the felon in possession of a firearm, probably because the jury instructions that were submitted by the parties suggested that; and that's probably where I got the idea that that was true. So my instructions have centered on that. And then when we first started, I told the jury that. So –

(The Court and the law clerk conferred off the record.)

THE COURT: So when we started the trial this morning or yesterday morning, I read the elements of that offense as what we were going to trial on. So I'm finding

there's not any prejudice by there having been two different indictments and that the case proceeded on the basis of the indictment that was the original indictment.

Now, if that's a structural error that can't be cured, I don't – I'm not addressing that. But at least from my perspective, the notice provided by the grand jury indictment was sufficient; and then the parties proceeded on the basis of [586] that throughout the trial.

I'm bound by the precedent that suggests that the evidence is sufficient to satisfy interstate commerce. I believe that it may well be that the type of nexus to interstate commerce that has been found sufficient in the past may be revisited. You've got a Supreme Court that has revisited it on more than one occasion. And there's not a whole lot more in interstate nexus in these cases than there are in some others. But the precedent is that this is sufficient, and I will follow that. So I'm denying the motion based upon that some further connection to commerce is required, finding the evidence, if believed by the jury in this case, is sufficient to satisfy the interstate nexus instruction that I'm giving.

I find that there's sufficient evidence for the jury to find the interstate nexus. My recollection – and it may be wrong, but the record will reflect it – was when Mr. Jessen was asked if he had an opinion about the interstate nexus issue that Mr. Weatherhead objected on the basis of hearsay and a number of other things. And I overruled that objection based upon the fact that the question that was being asked was only yes or no and it wasn't the opinion. He then gave his opinion without further objection; and I expected an objection at that point, which then I would have ruled on. However, to sort of cure that, I

thought about it; and I looked at some precedent out of the circuit where Maine is. I don't remember what [587] circuit that is any more. But there was a case out of there called *Corey*, and I looked at some Ninth Circuit material. And I believe this witness had the expertise to testify to the place of manufacture of firearms based upon his background and his other identifications of firearms, including the same firearm that he had looked at on other occasions. I found that he was qualified to give such an opinion and that the basis of his opinion – being the examination of the firearm; his knowledge of the requirements of Congress that he testified to that the manufacturers are required to put this on the firearm; his knowledge of the recordkeeping, to the extent it was testified to, of the Alcohol, Tobacco & Firearms Department and what those records showed with respect to the origins of this firearm; and his inspection of it and his knowledge of firearms in general – was sufficient to give an opinion. So even though there wasn't a renewed objection, I'm going to treat it as if it was made so that it's preserved.

I think that covers everything. And I'm denying the Rule 29 motion. Is there anything I haven't covered?

MR. WEATHERHEAD: I don't think so, Your Honor. Thank you.

THE COURT: All right. Court's in recess till 3:00. (The proceedings recessed at 2:00 p.m.)

[588] CERTIFICATE

I, DEBRA KINNEY CLARK, do hereby certify:

That I am an Official Court Reporter for the United States District Court at the Eastern District of Washington;

That the foregoing proceedings were taken on the date and at the time and place as shown on the first page hereto; and

That the foregoing proceedings are a full, true and accurate transcription of the requested proceedings, duly transcribed by me or under my direction.

I do further certify that I am not a relative of, employee of, or counsel for any of said parties, or otherwise interested in the event of said proceedings.

DATED this 16th day of August, 2005.

/s/ Debra Kinney Clark
Official Court Reporter
United States District Court
Eastern District of Washington

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA, Plaintiff, vs. LADEL BAPTISTE HARRISON, Defendant.	No. 03-CR-016-RHW Spokane, Washington Appeal Transcript 3-01-05 PM Proceedings Volume 11 Pages 589-651

BEFORE THE HONORABLE ROBERT H. WHALEY
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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(509) 990-1475

Proceedings reported by mechanical stenography; transcript produced by computer-aided transcription.

* * *

[604] act and does not act through ignorance, mistake, or accident. The government is not required to prove that the

defendant knew that his acts or omissions were unlawful. You may consider evidence of the defendant's words, acts, or omissions, along with all the other evidence, in deciding whether the defendant acted knowingly.

JURY INSTRUCTION NO. 7:

A person has possession of something if the person knows of its presence and has physical control of it, or knows of its presence and has the power and intention to control it.

More than one person can be in possession of something if each knows of its presence and has the power and intention to control it.

JURY INSTRUCTION NO. 8:

A "firearm" is any weapon that will, or is designed to, or may be readily converted to, expel a projectile by the action of the explosive.

JURY INSTRUCTION NO. 9:

The second element that the government must prove beyond a reasonable doubt is that the firearm the defendant is charged with possessing had traveled in or affected interstate commerce.

This means that the government must prove that at some time prior to the defendant's possession, the firearm had traveled in interstate commerce. It is sufficient for the [605] government to satisfy this element by proving that at any time prior to the date charged in the indictment, the firearm crossed a state line. It is not necessary that the government prove that the defendant himself carried it across a state line, nor must the government prove who carried it across or how it was transported. It is also not

necessary for the government to prove that the defendant knew that the firearm had previously traveled in interstate commerce.

JURY INSTRUCTION NO. 10:

The third element you must find beyond a reasonable doubt before you can convict the defendant of the charge in the indictment is that the defendant had been convicted of a crime punishable by imprisonment for a term exceeding one year in any U.S. Federal or state court prior to the date he is charged with possessing a firearm.

The defendant has stipulated that he was convicted of a crime punishable by imprisonment for a term exceeding one year prior to the date charged in the indictment. Based upon this stipulation you are instructed that this element of the offense has been proven beyond a reasonable doubt.

JURY INSTRUCTION NO. 11:

The parties have agreed to certain facts that have been stated to you. You should therefore treat these facts as having been proved.

* * *

[651] CERTIFICATE

I, DEBRA KINNEY CLARK, do hereby certify:

That I am an Official Court Reporter for the United States District Court at the Eastern District of Washington;

That the foregoing proceedings were taken on the date and at the time and place as shown on the first page hereto; and

That the foregoing proceedings are a full, true and accurate transcription of the requested proceedings, duly transcribed by me or under my direction.

I do further certify that I am not a relative of, employee of, or counsel for any of said parties, or otherwise interested in the event of said proceedings.

DATED this 17th day of August, 2005.

/s/ Debra Kinney Clark
Official Court Reporter
United States District Court
Eastern District of Washington

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA, Plaintiff, vs. LADEL BAPTISTE HARRISON, Defendant.	No. 03-CR-016-RHW Spokane, Washington Appeal Transcript 6-17-05 Proceedings Volume 12 Pages 652-683

BEFORE THE HONORABLE ROBERT H. WHALEY
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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[660] (June 17, 2005; 8:00 a.m.)

THE COURTROOM DEPUTY: We have *United Sates of America v. Ladel Harrison*, Case No. CR-03-016. Time set for sentencing hearing.

MS. BYERLY: Your Honor, as indicated by the government's response to the sentencing memorandum as well as a review of the pre-sentence investigative report, the government is in agreement with the calculations as well as the facts in the pre-sentence report; agrees that defendant is facing a 15-year sentence that's mandatory by statute. Also, the government agrees that we have a base offense level of 26. That's a base offense level of 24, plus a 2-level enhancement for defendant possessing a stolen weapon. And then because he is ACC-qualified, he goes into the base offense level of 33, criminal history category VI, based on 22 criminal history points, guideline range 235 to 293. The government is recommending a sentence within the guideline range, Your Honor.

Your Honor, also, as indicated in my response, there were attachments having to do with certified documents from the court record; and I would at this time like to hand those up to the Court as exhibits in this case.

THE COURT: All right.

MS. BYERLY: And defendant has received copies pursuant to that sentencing memo – all documents of – the charging documents – everything that's in there, as well as [661] the transcript of the change of plea hearing.

THE COURT: Okay.

MS. BYERLY: Thank you, Your Honor.

MR. WEATHERHEAD: Your Honor, respectfully, we did receive copies. I object to the admission or acceptance of these documents.

THE COURT: Can you wait just a minute?

Ms. Byerly, would you come back up?

MS. BYERLY: Certainly.

THE COURT: All right. Just a minute. Now, I need you to speak louder, Mr. Weatherhead.

MR. WEATHERHEAD: Sorry, Your Honor. I just wanted to reserve my objection to the admission of these documents for the intended purpose at this time, it being my view that it is outside the competence of the Court, if this really is a mandatory sentence, to make the finding that Ms. Byerly invites by virtue of these documents. If, under *Booker*, it's not a mandatory sentence, then I think the Court is free to make the findings.

THE COURT: Let me paraphrase you so the record is clear. It seems to me you're saying that the nature of the underlying offenses to qualify for the enhancement as an armed career criminal have to be determined by a jury if it's a mandatory 15 years.

MR. WEATHERHEAD: That is correct, Your Honor.

[662] THE COURT: All right. But you're not objecting to the authenticity and all that. It's just the legal requirement of who should make that judgment.

MR. WEATHERHEAD: That is correct, Your Honor.

THE COURT: All right. Thank you.

MS. BYERLY: Thank you, Your Honor.

THE COURT: Ms. Byerly –

MS. BYERLY: Yes.

THE COURT: – I want to ask you something. When Mr. Harrison was in the court two years ago, the government was satisfied with a sentence that I think started at 92 months in the guideline range and would have ended I think at a statutory maximum of ten years. And by having gone to trial, which is the only difference in the case – instead of being convicted by plea, he's convicted by a jury – the sentence – the guideline range goes up to 235 plus, plus the government is even suggesting that an upward departure is appropriate.

I feel somewhat like I'm the anvil against which people are being battered in that circumstance. It seems an extraordinarily high penalty for electing to go to trial. And I'm wondering how the government sort of sees that, that they were satisfied with a sentence that would have been maxed at ten years; and the only difference in the case is he went to trial, and now they're asking me to sentence him to over 20.

MS. BYERLY: Your Honor, a plea bargain was offered, [663] defendant accepted it, then he rejected it. We proceeded forward with all of the resources of our office to bring this thing to trial. We took the time.

Defendant had a very serious criminal history, as the Court is aware. That decision to offer that plea bargain was not taken lightly. In fact, when defendant withdrew his plea, the government was not disappointed by that

because the defendant does have such a serious criminal history and did second think whether that offer should have been made. But it was made.

I'm not sure about the departure. What upward departure am I referring to, Your Honor?

THE COURT: Well, the latter part of your brief says that even an upward departure may be appropriate.

MS. BYERLY: Well, all right. I am stating on the record today that within the guideline range is appropriate. 235 to 293 months is certainly a lot of time. Low end, certainly, considering all of the factors that the government has considered; and the government would agree with a 235-month sentence.

Your Honor, defendant – the government has spent a lot of time with this case, as has the Court. At the beginning, I don't think the government knew all the facts of defendant's criminal history. I don't – the government does not believe that this sentence is inappropriate. And the government, after [664] reviewing all of the documents in preparation for trial, and getting ready for trial and getting to know this case very thoroughly, does not disagree with a 235-month sentence. I guess the change would be in that the government received more information, became more familiar with the case, and now believes this is an appropriate sentence.

THE COURT: All right. Mr. Weatherhead and Mr. Harrison, come on up.

Mr. Harrison, have you gone over the pre-sentence report with your lawyer?

THE DEFENDANT: Yes.

THE COURT: Do you have any changes or additions you want to make, other than those that have been suggested by him in his briefs?

THE DEFENDANT: No, sir.

THE COURT: All right. Mr. Weatherhead, do you agree that regardless of the base offense level, whether you were to take off the stolen firearm or whatever, that because – if he's an armed career criminal, you have a 33 as a starting point? In other words, I think it starts at 24. They've added 2 for the stolen firearm. I'm not sure I would do that because it was at a plea that's been withdrawn. But it seems like it doesn't make any difference to the calculation of 33 as the base offense level because that's driven by being – a determination that you're an armed career criminal as opposed [665] to the underlying adjusted offense level.

MR. WEATHERHEAD: Yeah. I guess if I understand you correctly, if that's determined, then that calculation – I don't quarrel with the calculus. I do quarrel, obviously, with the predicate.

THE COURT: I think we're communicating. In other words, you don't think that I can find he's an armed career criminal because the jury should do it, one; and, two, that even if I do it, the underlying offenses aren't sufficient. But if they are, and if I conclude I can do it, it's a 33. Regardless of whether I was to give him acceptance of responsibility or to take off the 2 points for the stolen firearm, it's still a 33.

MR. WEATHERHEAD: That would be the guideline calculation, subject, obviously, to the point that

the Court – that's a consideration for the Court, not mandatory upon the Court.

THE COURT: I understand.

MR. WEATHERHEAD: That much I think is clear.

THE COURT: All right. Well, that's – okay. All right. Who wants to speak first? Your client or –

MR. WEATHERHEAD: DO you have something?

THE DEFENDANT: No. I don't have nothing to say.

THE COURT: You don't have anything to say?

THE DEFENDANT: No. I'm all right.

[666] THE COURT: All right.

MR. WEATHERHEAD: Your Honor, thank you. I guess we devoted a lot of attention in our papers to the legal points I want to make; and so I don't want to belabor them, unless the Court has any questions. But I think I can usefully maybe spend a minute on *Almendarez-Torres.*

THE COURT: On what?

MR. WEATHERHEAD: On *Almendarez-Torres.*

THE COURT: All right. Yes.

MR. WEATHERHEAD: Obviously, the point here is we all know what *Booker* said. And *Booker* is sort of interesting in that you have the two plurality opinions that tell you that driving up the sentence without a jury trial violates the Sixth Amendment, on the one hand; but, on the other hand, you can fix that by saying a sentence

isn't mandatory. So our first position is that, really, there's no logical distinction to be drawn between a sentencing scheme that says it's mandatory that you pick a number between this range and this and a sentencing scheme that says it's mandatory that you impose at least 15 years. It is the mandatory aspect of the sentencing scheme that offends the Sixth Amendment, according to the two *Booker* opinions read together. So our first proposition is that either the predicate offenses had to have been heard and decided by that jury or this Court has to declare that it is not bound by the mandatory aspect of the sentencing guidelines.

[667] The only possible way out of that result, the only one offered by the government, and the only one that we could see and we predicted in our papers, because it was our duty to do it, is that the Supreme Court, in a case called *Almendarez-Torres*, had said that – and this, of course, was before *Booker*, *Fanfan*, and *Blakely* – but it had said at that point that prior convictions were a sort of special breed of sentencing fact and that a court could consider all of that without the necessity of referring it to a jury. And you get into kind of a thicket as to why that's true. I have a suspicion that Justice Breyer's thinking in *Almendarez-Torres* was driven in part by the result in a case called *Old Chief*, where the court was perplexed with the problem that proof of prior convictions could be prejudicial to defendants in their efforts to defend on the merits of the substantive offense of which a prior conviction was a part. And so I think the court probably had that somewhere in the back of its mind and said, well, well, you know, we're not going to start a regime where we're going to be trying cases all about prior offenses. We will say that

for sentencing purposes, the prior offenses are kind of a little bit different.

Now, I've got two reasons why *Almendarez-Torres* doesn't – it's actually one reason in two parts – why *Almendarez-Torres* doesn't work in this context. The first is that I think *Almendarez-Torres* means that it's always been a sentencing [668] consideration for a judge as to whether a person was a recidivist. And those of us who have been around long enough to remember before 1984, before all of this got more complicated than the tax code – that was always a consideration that a pre-sentence writer would look at, that the court would consider very heavily. Obviously, somebody who is a recidivist, who has a prior record of offenses, is going to merit a more serious punishment than somebody who has none.

And so when you think about the Court's sentencing function and discretion now under the sentencing guidelines, even, think about the prior criminal history as being the calculus that goes across the top of the grid, whereas the facts of the offense are the ones that go down the left side of the grid. And I guess what I'm saying to Your Honor is I'll tell you in a minute why *Almendarez-Torres* probably doesn't have any more force; but I recognize it's not for you to declare. You'll get told that you should follow it, even though everybody knows it's a dead letter. So we're going to follow it.

But I'm suggesting to the Court that *Almendarez-Torres* drive the Court's decisionmaking cross the top of that grid; that when you're deciding whether Ladel is a level VI, IV, V, III, II, I candidate for sentencing, you can do all those things without resort to a jury. I think that's all it means.

But now let's talk about the facts of the offense, which [669] is what drives the left descending side of the grid where the key weight is assigned to the offense. In this case, Your Honor, which was not true in *Almendarez-Torres*, a prior criminal conviction is an element of the offense, so that, in my mind, the prior criminal history of the defendant is something that's squarely in that left-hand descending column on the sentencing grid. It's not merely something that goes across the top.

THE COURT: Well, it is, only to the level of a 24; that is, that he had a prior conviction. That's the only one that's relevant to that jury determination.

MR. WEATHERHEAD: Oh, I think not, Your Honor. I think that, in fact, being a felon in possession is the name of the offense and that –

THE COURT: Yes. So the only felony that's relevant to the jury in that circumstance is the one that's the predicate offense.

MR. WEATHERHEAD: Well, I don't think so. I think what I'm telling you is is that they divided this criminal offense into two parts. It's one thing if you have four or fewer and another if you have four or more. And the four or more –

THE COURT: Not as to the offense. As to the sentencing, it is.

MR. WEATHERHEAD: Well, I guess my submission is it's [670] as to offense, because *Almendarez-Torres* did not involve a crime where being previously convicted was an element. This case does. And –

THE COURT: The jury found that.

MR. WEATHERHEAD: Right. But they didn't find that he had been previously convicted of four serious and violent offenses.

THE COURT: No. Those go to the sentencing. That's not for the jury to do.

MR. WEATHERHEAD: Well, I guess what I'm submitting to you, Your Honor, is that that's what makes this different.

THE COURT: I think I understand your argument, and you're right. I've got to follow precedent that exists now. But it seems to me that conceptually, the jury has to find one felony to convict; but the significance of the remainder of the record depends upon what the record is. If there's no record, there's nothing to do. If there's a certain record, then the offense level moves up.

MR. WEATHERHEAD: And I'm saying that what makes this case different is those prior offenses being elements of the offense and that this is a situation where more prior offenses drives up the penalty. So *Almendarez-Torres* doesn't fit here because in *Almendarez-Torres*, a prior conviction was not an element of the offense. Secondly –

THE COURT: Would you cure it by impaneling the jury [671] a second time to consider the criminal record? In other words, when the first jury has returned its verdict, would you just say now I'm going to present evidence on the criminal record; and you go back and get a second –

MR. WEATHERHEAD: That was probably an option before the jury was discharged. Once the jury is discharged, there's a huge double jeopardy problem. And I

know that in the original panel opinion in *Ameline*, something along those lines was contemplated; and I remember being kind of surprised at the time. But we don't know now because that aspect of the original panel decision in *Ameline* sort of fell away. Its not part of the ultimate result in *Ameline*.

So the second reason the Court should reject the government's invitation to apply *Almendarez-Torres* outside of its context in the immigration laws and apply it over on a new set of laws, the felon in possession of a firearm law, is that, as the Court knows, in *Shepard*, Justice Thomas declared himself no longer in support of the result in *Shepard*. And so if the distinction that I've offered holds water for the Court – and it sort of sounds like it doesn't, but it does for me – and if it does for the Court, the Court would be within its rights to say *Almendarez-Torres* ought to be confined and not deemed to be controlling as to any other statutory context where the conviction falls on the left side of that ledger and not merely across the top of the ledger. And it ought to be confined and [672] not applied, because it appears to us that the Supreme Court votes aren't there for that application.

So, Your Honor, there having been no jury determination on that issue, we say that the Court is either without discretion at this point to make the finding for the jury, or, if the Court does, in fact, have that jury – or – that discretion to make those findings that then it would be unconstitutional to apply a mandatory sentencing regime in this context.

Now, what's kind of interesting about this is that the government has offered you submissions. The government

has backhandedly conceded that it can't make the case that the offenses that it would include among priors that are eligible to drive up that sentence are categorically ones that would invoke ACCA. They've backhandedly conceded that by handing you documents by which they hope that you will expand the scope of your inquiry beyond the *Almendarez-Torres* official prior criminal record and into the realm of what were called, before *Booker*, before *Blakely*, judicially noticeable facts. There are no judicially noticeable facts that drive up sentences into a mandatory category any more. That is a concept that did not survive *Booker* and *Fanfan*, so that the Court cannot consider this material to make the determination that any of the prior convictions on which the government relies are, in fact, qualifying convictions.

The Court knows that the Court has a duty to apply laws as [673] they are written. That's the invitation that the government makes when it proposes to the Court that an absurd sentence for this offense – and I say "absurd" meaning no disrespect to the government. But this is an absurd law, calling for an absurd result, if it really means that for the act of buying a gun for the protection of a friend, putting it up high, out of everyone's reach on a cupboard, and touching it eight times is worth 20 years. That is absurd, Your Honor.

But the Court may say: I have to enforce the laws as they are written. If that is the case, then I say enforce it exactly as it is written. And exactly as it is written, it says eligibility for 15 years follows only if you have the predicate elements of the offense, which include the 1996 drug conviction, to which we stipulated, and – not "or" or "including", but "and" – three previous convictions of a violent and serious nature. There aren't three of them.

And among the ones that the government points to, two of them can't be shown to qualify without resort to extraneous evidence.

Finally, Your Honor, it being my view that you are not bound by a mandatory sentencing scheme, there are a couple of considerations that ought to drive this sentence downward. One of them is that I don't think a stolen gun finding is warranted. It's true that Mr. Harrison said that as part of his plea agreement. It appears to me as though the parties were trying to find a statute that would fit for the kind of [674] sentence that they had determined by virtue of their bargain. It may be that Mr. Harrison thought the gun was stolen. He had no foundation for that belief. There's no evidence that anybody ever told him that it was stolen or that he saw it was stolen. If he thought that, that evidence is not sufficient to lay the foundation for any evidence that the gun was stolen. Interestingly, we had evidence from a whole panoply of law enforcement who have all sorts of records tracing this gun; and there was no suggestion that at any time the gun had been in the possession of anybody who complained of its having been stolen.

The government's own evidence, the evidence that the government produced in this case, at the pretrial hearings, and at trial, established that the reason for obtaining the gun was for the protection of a young pregnant woman friend of Mr. Harrison's whose apartment had been broken into by a guy who was crazed on some kind of illegal substance. That was the government's evidence. They put it up here. And under *United States v. Youngblood*, they can't now say, well, pay no attention to the evidence that we offered you because it's not reliable; we don't even believe it. That's the admission of Mr. Harrison that they

offered to prove the case that they wanted to prove as to his knowing possession of that gun. They now have to stick with that. And that, in my mind, merits a downward departure for imperfect duress.

[675] Finally, Your Honor, I want to say – you know – as advocates, we're not supposed to offer personal opinions on any of this; but I'm going to do it anyhow. This is a young man of, in my mind, surprising intellect. I received a whole lot of written material from him; and it is – given his background, given the circumstances in which he grew up, it is surprisingly articulate and surprisingly deep – unusual, in my experience, in this kind of case.

It is true I believed, and I told the Court that I believed, that he may suffer from some sort of mental defect that affected his decisionmaking in this case. I was bound under my ethical rules to follow his direction. Once it became evident on the finding of the Court that he was capable of directing his own defense, I was bound to follow his direction as to withdrawal of the plea and as to taking this case to trial.

But I think the Court is quite right to question is there any justice in an outcome that says that an acceptable sentence of 10 years must be over 20 by mere virtue of his having decided to exercise his constitutional rights, particularly where he exercised them, in my mind, in circumstances of less than crystalline judgment? As to his judgment, Your Honor, the report of the Eastern State Hospital examiner says that he did not sufficient a mental defect that arose to a defense in this case or arose to any finding that he was incapable of directing [676] his own defense. But there were findings of a serious history of drug abuse, of paranoid delusion, of obsessive/compulsive

disorder, and of antisocial personality disorder. And I think if the Court's seen the video and considered his history, the Court may understand or think it understands – I think I do – how some of that may have come about.

I think those are factors that warrant heavy consideration, serious consideration of a downward departure, Your Honor. And it would be my plea to the Court that no matter what happens that the Court use every ounce of its power to try to bring about some sort of regime, no matter what happens to Mr. Harrison, to help heal him. There is potential in there that is being wasted, and it can be recovered with some serious effort by people who care. Thank you.

THE COURT: Anything you want to say, Mr. Harrison?

THE DEFENDANT: No, Your Honor.

THE COURT: On the legal issues, I believe that the Court is required to consider the evidence that has been presented to it about Mr. Harrison's criminal record and that it's not – it would be an abuse of discretion not to – it has to – and that the record is sufficient to establish that he's an armed career criminal. So I don't find that to be discretionary. I'm required to look at the record; and that record, in my judgment, establishes that he's an armed career criminal and that the legal arguments you've made will have to [677] be heard by a higher court as to who does that. But I think I have to do it at this point, not the jury.

I don't find anything in Mr. Harrison's background or in his criminal record that is compelling that makes me want to step out and treat him differently than other

people similarly situated; and that's usually what I consider at the departure level, as to whether there's something about the person that I feel distinguishes them from somebody else in the same circumstance. So I don't have a principled reason that I would depart from some sentence.

The armed career criminal statute is, to me, Congress' determination that there are certain types of people that the driving factor behind the sentence is protection of the public. In other words, it's past most of the – from Congress' standpoint, the person has passed any other motivation for sentence; and by and large, it's protection of the public. That's why they have the high base offense level and why the underlying calculations don't make any difference and why criminal history becomes VI and the sentencing ranges are so staggering. Applying that, the minimum range is 235 months, given what Congress has said how it sees this process.

As a sentencing judge, I have to have a compass someplace, so that my discretion isn't zero to 40 years that's unfettered. And I think it is fettered by all the considerations the Supreme Court has said I'm supposed to use. So the compass [678] that's sort of the brightest compass is what the guidelines have determined the sentences should be as you relate from one defendant to another. I've departed a bunch, and so I'm not afraid to do that. But I start with a compass someplace, and it's the guideline calculation that I begin with in the analysis of sentencing.

Within that structure, I think 235 months is a staggering amount of time. But that's also the amount that the law has said. And so the question I have – and it's the one I came out on the bench with, and it's the one that I would

present to the Circuit as whether or not it's something I could take into account – is I don't find anything about Mr. Harrison's background, his criminal history, or anything else that says that the public shouldn't be protected from him because he's been violent and he's been a significant drug dealer, and he hasn't conformed at all to the norms of society and he's a danger to the public. I don't know if he's a danger 235 months worth, but he is a danger; and the Congress has said that's the beginning part.

The one thing about this case that makes it different – and if this was enough – if the Circuit says that's a reason you can – that it's reasonable to take this into account in adjustments to what a reasonable sentence is in an advisory guideline system, where, to me, the beginning point is the guideline – it's the beginning point – it's advisory – but [679] it is a compass – is that this case was analyzed by the government two years ago with a sentence that would have been maxed I think at 120 months. And it seems to me to be a significant punishment for going to trial, which then results in a different charge and the case resulting in such a higher sentencing level.

So the record is clear, I would find that the lowest I could go is the mandatory minimum, which would be 180 months. But I'm going to sentence to 235 months, which is the low end, based upon the analysis I just gave. And if I could consider that prior handling of the case and the at least implicit recognition that a lower sentence would have been appropriate under the analysis at that time by the government and by the defense, and I could consider that, in my judgment, this is driven by the fact that the man elected to go to trial, which, by having done so, these consequences occur, then I would do that. I would consider

those, and I may not sentence to 235 months. But I think my lowest I could go would be 180.

So that's the record you have. I would not depart for any reasons personal to Mr. Harrison, but I would for the reasons I just described.

So I'm going to sentence to 235 months. Is there a mandatory on the supervised release?

THE PROBATION OFFICER: Its not a mandatory minimum type of supervised release, but it's not more than five years.

[680] THE COURT: All right. Do you want to comment on the supervised release?

MR. WEATHERHEAD: No, Your Honor. Obviously, I think it would be my client's personal desire that that be the least that the Court could see that it could impose.

THE COURT: I'm going to give you five years because if you get out, you're going to need a lot of structure to help you get through the process. If you need drug treatment, I'll recommend it. That can sometimes affect the amount of time you do. I'm going to waive the fine. I'm going to impose the $100 special penalty assessment.

Your conditions of supervised release will be that you'll be subject to being searched to make sure you're in compliance with the provisions of the sentence. You'll be ordered to have an analysis to see if you need drug treatment, and you'll be subject to urinalysis and other efforts to determine if you're using illegal drugs. You're not to associate with gang members.

Anything else that you want, Ms. Petretee?

THE PROBATION OFFICER: No, Your Honor. I do want to mention, though, that the defendant filed a number of objections to the pre-sentence investigation. Did you want to address those?

THE COURT: I don't think any of them affect the sentence. If there's anything you want a ruling on, I would. [681] But I don't think they affect the sentence, except the ones that I've ruled on already.

THE PROBATION OFFICER: Thank you, Your Honor.

THE COURT: You have a right to appeal this sentence. If you don't appeal it within ten days, you lose that right. You have a right to a transcript of the proceedings necessary to take the appeal, as well as a right to a lawyer to help you in that regard. And all that would be provided for by the government if you can't afford it, and the clerk would enter a notice of appeal for you today if you wanted her to.

Anything further?

MR. WEATHERHEAD: Your Honor, there was a ruling during the trial that had to do with – I guess – I think where the Court came out was that there were two indictments outstanding simultaneously, the original indictment and superseding indictment. The Court's ruling was that we didn't go to trial on the superseding indictment; that we went to trial on the original indictment. I think at this point I'm bound to ask for dismissal of the superseding indictment, the government having apparently elected to go to trial and seeking conviction on the original indictment.

THE COURT: Ms. Byerly?

MS. BYERLY: I think the defendant elected to go to trial, and that was on the indictment. And my understanding was that superseding indictment did not stand at that point. [682] But if necessary that it's dismissed –

THE COURT: Well, it's okay if I dismiss it if it's necessary?

MS. BYERLY: Yes, Your Honor.

THE COURT: All right. That would be dismissed.

MR. WEATHERHEAD: Thank you, Your Honor.

(The proceedings concluded at 8:45 a.m.)

[683] CERTIFICATE

I, DEBRA KINNEY CLARK, do hereby certify:

That I am an Official Court Reporter for the United States District Court at the Eastern District of Washington;

That the foregoing proceedings were taken on the date and at the time and place as shown on the first page hereto; and

That the foregoing proceedings are a full, true and accurate transcription of the requested proceedings, duly transcribed by me or under my direction.

I do further certify that I am not a relative of, employee of, or counsel for any of said parties, or otherwise interested in the event of said proceedings.

DATED this 18th day of August, 2005.

/s/ Debra Kinney Clark
Official Court Reporter
United States District Court
Eastern District of Washington